IN THE

Supreme Court of the United States

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October Term, 1951.

No. 514

LEROY J. LEISHMAN,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

I.

Prayer for Issuance of the Writ.

Your petitioner, LeRoy J. Leishman, respectfully prays that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 13, 1951, in the case of LeRoy J. Leishman, Appellant, v. General Motors Corporation, Appellee, Docket No. 12,485, to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Court of Appeals for the Ninth Circuit be reversed by this Honorable Court and such other relief granted as this Court may deem proper.

II.

Jurisdiction.

This Honorable Court has jurisdiction under Title 28, U. S. C. A., Section 1254, and 28 U. S. C. A., Section 2101, and petitioner is proceeding under Rule 38(5b) of the Rules of the Supreme Court.

The time period during which this petition should originally have been filed was extended on October 26, 1951, until January 7, 1952, by order of Mr. Justice Robert H. Jackson, Associate Justice of this Honorable Supreme Court.

III.

Summary Statement of Matter Involved.

This action was brought in the United States District Court for the Southern District of California by respondent General Motors Corporation against petitioner LeRoy J. Leishman. The complaint was filed under the Declaratory Judgment Act and requested the court to hold that claims 7 to 11 of petitioner's U. S. Patent No. Re. 20,827 were invalid, or, if valid, not infringed by certain radio push button tuning devices manufactured by respondent. Petitioner's answer denied that the said claims were invalid and not infringed by the said devices, and he filed a counterclaim alleging infringement and asking for damages.

The lower court held that the claims were anticipated and lacked invention; and the appellate court, arriving at its decision in a different manner than did the trial court, nevertheless affirmed the judgment.

The appellate court's decision which this Honorable Court is asked to review is the *eleventh* major decision

involving this patent that has been rendered by the Federal Courts in a series of four related suits extending over a period of thirteen years.[1] Few patents in the history of the patent system have occupied the attention of the courts for so long a time. The last two of these four suits were brought under the Declaratory Judgment Act by three large manufacturers apparently seeking to crush the inventor under an almost impossible load of litigation. In the United States District Court for the District of New Jersey, in a decision from which no appeal was taken, two of these manufacturers have since been fined $48,000.00 for violating the Sherman Act through illegal activities involving the very devices that were before the courts in one of these Declaratory Judgment Actions.[2] As these different suits have proceeded through the courts, the claims have variously been held valid and invalid, infringed and *not* infringed by devices that are patentwise the same.

As the appellate court correctly says in the opinion sought to be reviewed [R. 1187]:

> "The subject matter of the suit pertains to automatic tuning devices for radio receivers, devices by which a radio receiver may be tuned to particular stations by simply pressing a lever or pushing a button."

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[1]A brief summary of these eleven opinions is given in the appendix hereto, and most of them are also referred to in the introduction to the appended brief.

[2]*United States v. General Instrument Corporation, Radio Condenser Company, et al.*, 87 Fed. Supp. 157. Also Criminal Case No. Cr. 3960C.

The purpose of the invention is also correctly stated by the appellate court as follows:

> "In brief it may be said that the claimed invention relates to the problem of providing a simple and easy method of setting the buttons or keys of an automatic tuner so as to bring in, upon pushing any button or key, the desired broadcasting station selected from a broad band of frequencies." [R. 1188.]

The prior art tuner invented by Schaefer [R. 789] and manufactured by the Zenith Corporation during a two-year period before it was abandoned about 1928 [R. 147-148, 363], could be set "by a simple and easy method," but it required a great many parts. When attempts were made to simplify this mechanism in any drastic fashion, the method of setting the tuner was no longer "simple and easy." Efforts by many engineers to remedy the setting difficulties in simplified versions invariably resulted in the use of extra parts. Petitioner eliminated all the extra parts and removed all the setting difficulties by changing the shape and interrelation of the two basic members.

The opinion of the appellate court mentions many of the extra parts in the Schaefer tuner [R. 1196] manufactured by the Zenith Corporation and later discarded, and the court describes Marschalk's unsuccessful efforts to simplify it. [R. 1197 and 1189.] The record shows that the Crosley Corporation also sought to produce something better than the Schaefer device.

The engineers of respondent General Motors Corporation were also among those who attempted to simplify the Zenith-Schaefer tuner during the eleven year period between its appearance in 1927 and the issuance of petitioner's patent in 1938, but the device that resulted from

the efforts of respondent's engineers was still very complex. Although it was nevertheless manufactured commercially, it was finally abandoned in favor of petitioner's much simpler construction. Respondent then filed the instant Declaratory Judgment action in which the court was asked to hold that petitioner's combination was not an invention "in view of what was common knowledge and in view of the state of the art." [R. 7.]

The trial and appellate courts held that petitioner's combination would be obvious to any mechanic skilled in the art. Inasmuch as this combination was not obvious to respondent's own skilled mechanics and engineers, nor to Crosley's skilled mechanics and engineers, nor to Zenith's skilled mechanics and engineers, nor to Marschalk, these courts are manifestly wrong in holding that it would be obvious to any mechanic skilled in the art.

Petitioner contends that this decision is clearly in conflict with the demonstrated facts and with such applicable Supreme Court decisions as that rendered in *Expanded Metal Co. v. Bradford,* 214 U. S. 366, 381; and that the lower courts' decisions are also in conflict with such applicable Supreme Court decisions as that rendered in *The Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corporation,* 340 U. S. 147, because the whole of petitioner's simplified combination "exceeds the sum of its parts" by accomplishing the desired result with far less parts than any of the combinations which the skilled workers in the art were able to conceive.

Petitioner further urges that the few grounds given by the appellate court for its conclusions reveal a serious departure from the accepted and usual course of judicial proceedings. Among these grounds was the contention

of the appellate court that it could not reverse the lower court because the latter had had the exclusive opportunity of listening to the testimony of a certain witness whose testimony the appellate court stated was reasonably credible, whereas actually the said testimony was given on direct examination and was controverted by the witness himself on cross-examination with the consequence that the said witness was not even mentioned in the trial court's opinion. The testimony that impressed the appellate court, incidentally, was given by General Motors' chief radio engineer who was responsible for the complicated structure that respondent's engineers designed when they attempted to simplify the Zenith-Schaefer tuner, and his testimony concerned the "obviousness" of petitioner's far simpler structure which respondent admittedly used in more than one million car radios after discarding the General Motors design.

The U. S. District Court for the Western District of Oklahoma, which held the claims here at issue valid and infringed by tuners patentwise like those of respondent, found that eight million such tuners had been manufactured and used by a group of concerns that did not include General Motors. [Finding 25, p. 32 of the record in *Leishman v. The Richards and Conover Company*, which respondent filed in the trial of the instant suit.]

Inasmuch as two of the claims at issue call for only two special parts and a spring and the remaining three claims add only an operating member to transmit motion to the said two parts, petitioner contends that there is

no reasonable excuse for all the complexities that have arisen in the litigation of this patent for the past thirteen years and that this Honorable Court should extricate petitioner from this litigious chaos. A brief history of the past litigation of this patent is given in the appendix hereto.

The automatic push button tuners manufactured by respondent admittedly contain the two special or basic parts mentioned in the two preceding paragraphs and called for in two of the claims, and they also contain an operating member as called for in the other three claims; but the Court of Appeals for the Ninth Circuit in this and preceding cases has insisted on reading a lever into each of these claims and has previously held that tuners patentwise the same as those of respondent do not infringe because they have been operated by plungers that push straight in instead of by levers as pictured in the illustrative embodiment shown in the patent. Three other courts, on the other hand, have not considered a lever to be a part of petitioner's combination. The specific cases where their views are set forth are discussed in the appended brief. The issue of infringement cannot be decided without resolving this conflict.

The ultimate decision in this case will determine the final outcome of the Declaratory Judgment suit filed against petitioner by Radio Condenser Company and General Instrument Corporation, the two firms previously mentioned as having since been convicted of violating the Sherman Act through activities involving tuners that are patentwise the same as those of respondent General Motors Corporation. These three concerns manufacture most of the automatic tuners used by the radio industry.

IV.
The Questions Presented.

Questions That Must Be Determined in Order to Dispose of This Suit.

1. Are claims 7 to 11 of Reissue Patent No. Re. 20,827 valid?

2. Must a lever *per se* be considered a part of petitioner's combination as held by the Court of Appeals for the Ninth Circuit despite the fact that none of the claims at issue call for a lever and claims 7 and 8 call for no operating member of any kind; or is a lever *not* a part of petitioner's combination as held by the Court of Appeals for the Tenth Circuit, the United States District Court for the Western District of Oklahoma, and by Judge Harrison of the United States District Court for the Southern District of California?[8]

3. Are claims 7 to 11 of the said patent infringed by the push button radio tuners manufactured by respondent?

In addition to these three questions, the following question of general importance is raised by the opinion of the appellate court:

4. In cases where those skilled in the art have failed after repeated efforts to discover a certain new and useful

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[8]The opinions of these courts in this matter are set forth in the third reason relied upon for the allowance of the writ, beginning on page 13 hereof, and in the portions of this appended brief that support this reason, beginning at page 38 of the brief.

improvement, is the presence of invention in its final discovery to be determined according to the formula recommended by this Honorable Supreme Court in *Expanded Metal Co. v. Bradford*[4] and generally followed by the various circuits and especially by the Court of Appeals for the Second Circuit,[5] or is the presence of invention to be determined upon the basis of whether the Court in retrospect is able, or thinks it is able, to explain the scientific principles involved?

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[4]In *Expanded Metal Co. v. Bradford,* 214 U. S. 366, at 381, this Honorable Court said:

> "* * * It may be safely said that if those skilled in the mechanical arts are working in a given field and have failed after repeated efforts to discover a certain new and useful improvement, that he who first makes the discovery has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor."

[5]In *Landis Machine Company, et al. v. Parker-Kalon Corporation, et al.,* 190 F. 2d 543, 546, the Court of Appeals for the Second Circuit said:

> "* * * it scarcely needs more than the statement of the question to disclose the fatuity of asking judges, undisciplined in the craft and untutored in its inarticulate presuppositions, to say how far the innovation is beyond the powers of merely competent craftsmen. For that reason we have over and over again resorted to the history of what went before, the duration of the period during which the invention was needed but failed to appear and its acceptance when it did. These circumstances have seemed to us, not indeed an absolute determinant of invention, for there is none; but at least the best, and indeed almost always the only, rational approach to a solution."

V.

Reasons Relied Upon for the Granting of the Writ.

1. In determining the issue of invention, the appellate court, through the use of methods and standards in conflict with those used by this Honorable Court in its applicable decisions, has rendered a clearly erroneous opinion that will constitute a dangerous precedent tending to undermine established doctrine and to nullify the express intent of the patent laws and the constitutional provisions.

In the case of *The Great Atlantic and Pacific Tea Company v. Supermarket Equipment Corporation,* 340 U. S. 147, this Honorable Court has recognized anew that invention is a display of skill beyond that of the skilled worker in the art, and that its presence is indicated when a "conjunction or concert of known elements" produces "surprising consequences" and contributes something in which "the whole in some way exceeds the sum of its parts."

The opinion of the appellate court ignores these standards.

"Surprising consequences" are obviously present in a combination that produces a desired result with many less parts than the skilled workers previously deemed necessary, which was the situation here.

In the present case, many skilled workers tried to simplify an early automatic push button radio tuner invented by Schaefer [R. 789] and once manufactured by the Zenith Corporation and later discarded because of its complexities. [R. 386-387.] The appellate court states that "Marschalk, who followed Schaefer, undertook to

simplify the Schaefer device . . ." [R. 1197], and that the "patent to Marschalk *proved unsatisfactory* [petitioner's emphasis] because of difficulty of avoiding 'creeping' during the process of adjusting the device so as to bring in the desired station." [R. 1188-1189.] It is thus clear that Marschalk did not know how to remove this difficulty, and the opinion admits [R. 1196] that Schaefer's device, which avoided this difficulty, required many extra parts.

The patent at issue was granted to petitioner for solving this problem without adding any extra parts whatever,[6] but the appellate court has held that any skilled worker in the art would readily arrive at petitioner's solution. This conclusion is repugnant to the Court's own statements regarding Marschalk's inability to solve the problem and Schaefer's failure to do so without adding many extra parts. Had the Court mentioned the many other engineers who worked on the simplification of the Zenith-Schaefer tuner, the gross error of its conclusion would be even more apparent.

Particularly bad in this regard is the omission from the opinion of any reference whatever to General Motor's own efforts that were specifically directed to simplifying the Schaefer tuner. Five engineers worked on the General Motors tuner project;[7] but the ultimate tuner, which actually went on the market, was only a slight simplifica-

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[6]During the prosecution of his patent, petitioner pointed out to the Patent Office that the Zenith engineers would not have tolerated all the extra parts in the Schaefer tuner if these parts could have been eliminated by ordinary mechanical skill. [R. 1023.]

[7]The supporting data for this statement are given in the portion of the appended brief devoted to this first reason for the allowance of the writ.

tion over Schaefer's. (Br. p. 20 *et seq.*) This General Motors tuner was ultimately abandoned in favor of petitioner's vastly simpler structure which respondent used in about one million Chevrolet, Pontiac and Buick car radios before the date of the trial. [R. 415.] After the General Motors engineers had failed to arrive at petitioner's simple combination, respondent filed this Declaratory Judgment suit asking the Court to hold that Petitioner's construction involved only mechanical skill. The trial and appellate courts obviously could not have acquiesced in this illogical and outrageous demand had they followed such applicable decisions of this Honorable Supreme Court as those in the *Supermarket* case, *supra*, and *Expanded Metal Co. v. Bradford*, 214 U. S. 366, 381.

These matters will be more fully discussed in the appended brief.

2. The appellate court, in deciding the issue of invention, has not exercised the care which this Honorable Supreme Court has admonished the lower courts to use, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's supervisory powers.

The appellate court's irregularities in this respect include: (a) saying that it could not reverse the lower court because the latter had had the exclusive opportunity of listening to the testimony of a certain witness whose testimony the appellate court stated was reasonably credible, whereas actually the said testimony had failed to stand up under cross-examination and the said witness was accordingly not even mentioned in the lower court's opinion; (b) making con-

trolling statements of fact that were controverted right in the opinion by testimony previously quoted with apparent approval; and (c) accepting an admittedly made-over device from an obviously non-analogous art as an anticipation of petitioner's solution of the "creeping" problem.

The serious carelessness of the appellate court in these matters is thoroughly demonstrated in the appended brief, beginning at page 24 thereof.

3. There has long been a conflict between the Court of Appeals for the Ninth Circuit and three other courts including the Court of Appeals for the Tenth Circuit regarding whether petitioner's structure must be operated specifically by a lever and whether a lever per se is a part of petitioner's patented combination; and the Court of Appeals for the Ninth Circuit has now ballooned its old untenable contention that a lever is a part of this combination into a primary reason for holding that petitioner's contribution does not meet the test of invention which is applied in Pointer-Willamette Co. v. Six Wheel Corporation, 177 F. 2d 153.

If this Honorable Court should resolve this conflict by stating that the claims are not to be narrowed from their literal wording and that an operating member is therefore not a part of the combination claimed in claims 7 and 8 and that the operating member called for in the remaining claims does not have to be a lever, then the Court of Appeals for the Ninth Circuit could no longer hold that petitioner's combination does not meet the test for invention set forth in the *Six Wheel* case, *supra*. This would also automatically decide the issue of infringement.

This additional reason why the writ should be granted is more fully discussed in the appended brief, beginning at page 38 thereof.

4. Though two of the claims at issue call for only two simple parts and a spring, and the remaining three claims add only an operating member to transmit motion to the said two parts, the Courts of Appeals for the Ninth and Tenth Circuits have made a complicated litigious mess of the litigation of this patent by (a) ignoring the record of the failure of skilled engineers to arrive at petitioner's simple solution of the problem involved, (b) by ignoring the statements made on cross-examination by the expert witnesses opposing the patent, and (c), perhaps more seriously, by usurping the usual functions of an expert and then making their own initial findings of fact upon the basis of their own non-expert theories.

While the Court of Appeals for the Ninth Circuit in the instant case does not adopt nor express approval of the supposed scientific theories originated by the Court of Appeals for the Tenth Circuit, it nevertheless arrives at the same erroneous conclusion of non-invention by equally untenable initial findings of its own. By thus avoiding findings that are co-extensive with those of the Court of Appeals for the Tenth Circuit, the Court of Appeals for the Ninth Circuit has deprived petitioner of a clean-cut conflict to present to this Honorable Supreme Court relative to the issue of invention, although such a conflict exists as to whether the claims would be infringed. But the present situation is even worse than a conflict, because it is the culminating opinion in a long series of eleven in which this sort of thing has been going on. Al-

though Judge Chandler of the United States District Court for the Western District of Oklahoma thoroughly considered all the evidence and arrived at a complete understanding of the scientific principles involved by persistently cross-examining the witnesses himself, his pertinent findings and conclusion of invention (pp. 28-33 of the Richards and Conover record, filed in the present action by respondent) have come to naught because the appellate courts have brushed aside the admissions of the experts opposing the patent and substituted their own theories in the expert field.

For thirteen years your petitioner has been the frustrated victim of this sort of jurisprudence, sponsored by several large corporations, and this Honorable Court should now look into these unorthodox proceedings.

This fourth reason for the allowance of the writ is supported by facts referred to in the appendix, in the introduction to the brief, and throughout the discussion of the other reasons, and no portion of the brief has been devoted especially to this fourth reason.

5. This is a very important suit, the outcome of which will determine whether justice is ultimately to be realized from many years of litigation in three different circuits involving still other litigants who are now before the courts in the Ninth Circuit.

Although respondent, which brought this action, is itself the largest manufacturing concern in the world, the final decision in this suit will also be controlling in related proceedings in the Ninth Circuit involving General Instrument Corporation and Radio Condenser Company—two firms that previously benefited from an erroneous

decision (167 F. 2d 890) in a Declaratory Judgment action which they brought against petitioner as a part of activities later held to have been a violation of the Sherman Act. The United States District Court for the District of New Jersey has since convicted these two concerns of monopolizing 65% of the nation's business in tuning condensers for radio receivers and tuning condensers combined with automatic tuners. (87 Fed. Supp. 157.) All these tuners embodied the combination covered by the patent claims here at issue and are in all pertinent respects the same as those of respondent. A decision from his Honorable Court regarding the issues of validity and infringement in the present case will thus settle a controversy involving three very large and important concerns in the radio industry that together control nearly all the manufacturing of radio push button tuners. They have incorporated the invention which they pirated from petitioner in approximately ten million tuners, General Motors alone having admitted to the manufacture of one million prior to the date of the trial.

In the Declaratory Judgment action brought by Radio Condenser Company and General Instrument Corporation against petitioner, the Court of Appeals for the Ninth Circuit affirmed a summary judgment which held that their tuners did not infringe because they were operated by plungers instead of levers and that these well-known alternatives are not equivalents. However, one of these convicted violators of the Sherman Act specifically contended before the Patent Office that plungers and levers *are* equivalents, but they nevertheless prevailed in a joint suit against petitioner on the opposite premise that these alternatives are *not* equivalents. Subsequent to the entry of the affirmed summary judgment against petitioner in

the Declaratory Judgment action brought by these concerns, it has been discovered that their peculiar activities in the Patent Office and in the courts of the Ninth Circuit were all a part of their adjudged illegal activities in violation of the Sherman Act, and a timely motion was made to re-open the case on the grounds that these litigants came into court with unclean hands, and on the additional ground of newly discovered evidence as to the equivalence of levers and plungers—a part of such evidence being the contentions of one of these concerns before the Patent Office.

Radio Condenser Company and General Instrument Company manufactured all the tuners involved in the litigation respecting this patent in the Tenth Circuit, but the decision of the Court of Appeals of the Tenth Circuit is not *res adjudicata* with respect to them because they were not the nominal defendants and they did not intervene. The litigation involving Radio Condenser Company and General Instrument Corporation in the Ninth Circuit thus supersedes everything that took place with respect to the products involved in the Tenth Circuit. Inasmuch as the ultimate decision in the present case will be *stare decisis* with respect to these other litigants, a decision by this Honorable Court regarding the General Motors controversy will settle the matter for the manufacturers that control practically all the manufacturing of automatic radio tuners in America.

Where a decision by this Honorable Supreme Court would settle a controversy involving most of the concerns in a given field, this Court has not hesitated in the past to pass upon the issues. In *Altoona Publix Theatres v. American Tri-Ergon Corp.*, 294 U. S. 477, most of the concerns were in a single circuit, but this Honorable

Court granted certiorari despite the fact that there was no conflict between circuits. In *Mackay Radio and Telegraph Company, Inc. v. Radio Corporation of America,* 306 U. S. 86, 59 S. Ct. 427, 83 L. Ed. 506, there were only two possible litigants, and certiorari was granted because an opinion of this Court would therefore settle the controversy for the entire industry as thus constituted.

If the present petition involving the General Motors case is not granted, petitioner will have no alternative but to drop the proceedings against Radio Condenser and General Instrument, because the erroneous decision of the appellate court in the present case would then become *stare decisis* in any re-opened proceedings involving the other litigants.

Since the present practice under the Declaratory Judgment Act will make it practically impossible ever to secure an independent adjudication of this patent in another circuit, it is extremely important that the final opinion in the instant case be the correct one. In *Triplett, et al. v. Lowell, et al.,* 297 U. S. 638, 56 S. Ct. 645 at 648, this Honorable Court said: "We conclude that neither the rules of the common law applicable to successive litigations concerning the same subject-matter, nor the disclaimer statute, precludes relitigation of the validity of a patent claim previously held invalid in a suit against a different defendant." But if a patentee has once had an adjudication against his patent in the circuit where he resides, the doctrine expressed in *Triplett v. Lowell* is rendered ineffective, because anyone desiring to appropriate the teachings of his patent can thereafter come into his circuit under the Declaratory Judgment Act and obtain a rubber stamped judgment against him without a

trial just as Radio Condenser Company and General Instrument Corporation did in their suit against petitioner.

The facts above set forth are considered sufficient to support this fifth reason, and it is therefore not discussed in the appended brief except for references in the introduction thereto.

For the foregoing reasons your petitioner earnestly urges that his petition be granted.

Dated this 4th day of January, 1952.

LEROY J. LEISHMAN,
Petitioner in Propria Persona.

JOHN FLAM,
Counsel.

Certificate.

This petition is in my judgment well founded, and is not interposed for delay.

LEROY J. LEISHMAN,
Petitioner in Propria Persona.

APPENDIX.

Brief History of the Past Litigation of This Patent.

The Summary Statement of Matter Involved stated that there have already been eleven major decisions in the litigation of the patent here at issue, and that the claims here involved have been held valid and invalid as well as infringed and not infringed by devices that are patentwise identical to those of respondent.

The first decision was that of Judge Harrison in *Leishman v. Associated Wholesale Electric Company,* 36 Fed. Supp. 804. In that case, as here, the accused devices were operated by plungers, and the court correctly said (p. 806):

> ". . . it cannot be seriously denied that the accused device uses a rotatable rocker, adjustable tappet and when brought to rest the two parts are coaxial—the essential elements contained in the plaintiff's structure."

A few paragraphs later in the decision, Judge Harrison reiterated:

> ". . . as I have stated before, it contained plaintiff's [Leishman's] combination, . . ."

But he held there was no invention in petitioner's coaxial tappet and rocker combination because (36 Fed. Supp. 804, at 808):

> "The importance of the mechanical relationship is well known in the art and a feature that must be considered in all machine designing *when you desire parts to move together harmoniously* and free from friction. . . . It is a mechanical principle that is hundreds of years old." (Emphasis supplied.)

The appellate court in the *instant* case has made it very clear that the purpose of the coaxial relationship in petitioner's combination is *exactly opposite* from what Judge Harrison said was old, and that its purpose here is to *prevent* absolutely *all* rotation of the rocker during the adjusting process, and that *any* movement would be fatal to a proper setting. Properly viewed, the old uses of coaxiality tended to show that petitioner's use was unorthodox and inventive.

The second opinion in this protracted litigation (128 F. 2d 204) was rendered by the Court of Appeals for the Ninth Circuit when Judge Harrison's decision came up on appeal. The three judges *unanimously* ruled that the appeal had been filed *too late.*

The *third* opinion was rendered by this Honorable Supreme Court (318 U. S. 203). All nine justices unanimously held that the said appeal had been filed *on time* and that the reasoning of the appellate court was "artificial and untenable."

In the *fourth* opinion (137 F. 2d 722), the Court of Appeals acted upon the appeal from Judge Harrison's decision in the *Associated* case. Although Judge Harrison formally ruled only on the issue of invention, the appellate court formally ruled only on the issue of infringement. Judge Harrison had stated unequivocally that the accused tuners "contained plaintiff's combination," but the appellate court freed the accused devices because they were operated by plungers instead of levers as pictured in the illustrative embodiment shown in the patent drawings.

None of the claims, however, called for levers—in fact, two of the claims did not even include an operating member of any kind. As to Judge Harrison's holding of invalidity, the appellate court stated (137 F. 2d 722, 727, 728):

> "* * * The judgment declares that the claims 'are invalid for want of invention.' In the view we take, the declaration is unnecessary. As to its correctness or incorrectness, we express no opinion.
>
> "The judgment is modified by striking therefrom the above quoted declaration and, as thus modified, is affirmed."

The *fifth* decision was that of the District Court for the Western District of Oklahoma in *Leishman v. The Richards and Conover Company,* Civil Action No. 2155, involving tuners manufactured by General Instrument Corporation and Radio Condenser Company. These tuners were in all pertinent respects the same as those accused in the *Associated* case, *supra,* as well as those in the instant action. Judge Chandler exhibited an excellent understanding of mechanical and patent matters. He operated and discussed the various models and even cross-examined the witnesses extensively. He held the claims "clearly valid and clearly infringed." This decision, following that in which the Court of Appeals for the Ninth Circuit had wiped out Judge Harrison's holding that the claims were invalid for want of invention, strongly reinforced the presumption of validity.

The *sixth* decision was rendered by the United States District Court for the Southern District of California in the case of *Radio Condenser Company and General Instrument Corporation v. Leishman,* unreported. This was a Declaratory Judgment action in which the manufacturers of the tuners held to infringe in *The Richards and Conover* case, *supra,* asked the California court to hold that they did *not* infringe. The lower court, bound by the decision of its appellate court in the *Associated* case, *supra,* granted a summary judgment that these tuners were *not* infringments because they were operated by plungers.

The *seventh* decision was that of the Court of Appeals for the Ninth Circuit in *Leishman v. Radio Condenser Company and General Instrument Corporation,* 167 F. 2d 890. This was the appeal from the District Court's summary judgment of non-infringment. Numerous exhibits were in the record to show that plungers and levers had long been used as equivalents for operating automatic tuners and that they were probably the most commonly encountered of all mechanical equivalents. But the appellate court affirmed the lower court and reaffirmed its own decision in the *Associated* case holding that infringement of petitioner's combination could be avoided by substituting a plunger for the lever as an operating member. In reaffirming its old decision in the *Associated* case, the appellate court (p. 892 of the opinion) said: "Our decision has not been reversed or overruled. The California court was not at liberty to overrule it. We could overrule it

if we thought it was wrong, but, after reconsidering it, we think it was right and now reaffirm it."

The *eighth* decision was that of the Court of Appeals for the Tenth Circuit in *The Richards and Conover Co. v. Leishman,* 172 F. 2d 365. In this opinion the Court of Appeals for the Tenth Circuit manifestly paid little attention to the evidence and to the findings of the trial court but was governed primarily by Judge Harrison's decision in the *Associated* case, *supra.* The appellate court even uncritically copied the same rather obvious errors. Although the first part of the appellate court's opinion recognized that the purpose of the coaxial relationship was to *prevent* unwarranted movement at the time of adjustment, the latter part of the opinion overlooked this important fact, and the reason given for a holding of non-invention was a rephrasing of Judge Harrison's statement regarding the old conventional uses of coaxiality to *facilitate* rotation, thus:

> "The principle of coaxial relationship and its importance *where it is desired that two parts of a machine operate together harmoniously,* has been within the knowledge, for many years, of ordinary mechanics skilled in the art." (172 F. 2d 365 at 369.)

The court held the claims invalid because of this clearly irrelevant fact.

But the court nevertheless stated that the claims did not call for a lever and it went out of its way to show that it disagreed with the two decisions of the Court of Appeals for the Ninth Circuit in its holdings that the claims here at issue could be avoided by operating petitioner's combination by means of a plunger.

Petitioner asked for a rehearing on the issue of validity, pointing out that petitioner's use of a coaxial relationship *to prevent* movement was diametrically opposite to the court's cited old use of a coaxial relationship "where it is desired that two parts of a machine operate together harmoniously." The court granted the rehearing and then rendered the *ninth* decision in this total series, this decision after rehearing being published in the Federal Reporter along with the court's original decision. The later decision included a purported mathematical analysis of the reasons for creeping. This analysis was intended to show how the court thought a skilled mechanic would arrive at a coaxial relationship as a means of *preventing* the movement of the tappet and rocker. This analysis had no basis in the record, nor did the court so contend. The court based its conclusions largely upon a comparison of dimensions in its own grossly inaccurate drawings; upon the position of the apex of a triangle with respect to an admittedly imaginary line, the triangle purporting to represent Marschalk's tappet, which had no apex; and upon ideas of forces and lever arms totally at variance with elementary principles of physics as taught even in high schools. But even if the court's *sui sponte* sojourn into

the field of an expert witness had led to a correct analysis of the reasons for creeping, such an analysis still would have been of no moment—because the record showed that numerous engineers had been faced with the problem, and none but Leishman was able to provide the solution.

The *tenth* decision [R. 41 *et seq.*] was rendered by the trial court in the instant case. Although the trial was held months before the Court of Appeals for the Tenth Circuit rendered its two decision in *The Richards and Conover* case, *supra,* the lower court stated it was not going to render its opinion herein until it learned the outcome of the appeal in the Tenth Circuit. [R. 185-186.] In line with this advance indication, the lower court based its holding of non-invention primarily upon the decision of the appellate court in *The Richards and Conover* case.

Petitioner asked for a rehearing of the lower court's decision herein, pointing out that since the analysis of the Court of Appeals for the Tenth Circuit had no basis in the expert testimony in that case and was rendered subsequent to the trial of the instant case, petitioner consequently had had no opportunity to introduce expert testimony anywhere to show the errors in the said appellate court's own self-offered expert testimony. The motion for a rehearing in the lower court was supported by affidavits from the *head* of the department of mechanical engineering at the University of California [R. 78], the *head* of the department of mechanical engineering at the California Institute of Technology [R. 71], and the *head* of the department of engineering research at the Univer-

sity of California at Los Angeles [R. 75].[3] The requested rehearing was denied.

The *eleventh* opinion is the one rendered by the Court of Appeals for the Ninth Circuit in the instant case. The reasons why this decision should be reviewed are of course presented in the Reasons Relied Upon for the Allowance of the Writ. Suffice it to say here that the court nowhere indicates that it agrees with the analysis made by the Court of Appeals for the Tenth Circuit. Each court that has rendered a decision of non-invention has gone outside the expert testimony for a theory to support its own independent view.

Respondent's brief before the appellate court says (p. 5 thereof): "In spite of the complicated litigious history of the patent in suit, the issue on this appeal is not complicated." How true of the issues before each of the courts! All the accused devices have been patentwise the same. Four of the claims call for only three elements and the other for only four, and none of them calls for a lever. But "the complicated litigious history" shows what a tangled web the courts can weave when they try to reconcile or rationalize previous opinions instead of getting down to the simple evidence before them.

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[3]The fact that these outstanding authorities are the heads of these departments in their respective universities, is not apparent from the opinion here sought to be reviewed, as the opinion refers to the first two merely as professors in their respective departments and to the latter merely as an *expert* in engineering research at the University of California at Los Angeles. [R. 1199.]

IN THE

Supreme Court of the United States

October Term, 1951.

No.....

LEROY J. LEISHMAN,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A. Introduction.

In order that there may be no misunderstanding as to the nature of the reasons relied upon for the allowance of the writ, it should be stated at the outset that the Courts of Appeals for the Ninth and Tenth Circuits have both held that the claims here at issue are invalid for want of invention. This would seem on its face to represent a state of agreement between these appellate courts that would render all other questions moot. To say that these courts have arrived at their opinions in different ways might seem of little moment, and petitioner might be accused at the outset of begging the question. But a succession of eleven opinions in which the general pattern has been that each new court hesitates to follow the reasoning of the previous court and prefers to arrive at its opinion

in a new and different way, creates a travesty on justice and should raise serious doubts as to the wisdom in any of the opinions.

In all these eleven decisions there has been only one that did not differ with the previous opinion or at least attempt to rationalize the previous one. This was the decision of the lower court in the present action. The opinion sought to be reviewed states that the lower court "relied heavily" [R. 1192] upon previous opinions. It had little to say about the record before it, and that little was mostly wrong.[1] The appellate court has therefore largely made its own findings.

A short summary of each of these opinions is given in the appendix. It will be helpful here, however, to outline briefly the peculiar situation that developed between the appellate courts.

The first opinion that came up for review was that of Judge Harrison in *Leishman v. Associated Wholesale Electric Company,* 36 Fed. Supp. 804, in which the claims were held invalid for want of invention. The Court of Appeals for the Ninth Circuit unanimously held that the appeal was filed too late and dismissed the appeal. (128 F. 2d 204.) This Honorable Supreme Court granted certiorari and unanimously held that the appeal was filed on time. (318 U. S. 203.) The Court of Appeals then

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[1]As a matter of fact, the trial court's only reference to the evidence before it is confined to the very small portion of its decision extending from the bottom of page 46 to the middle of page 48 of the printed record, and the appellate court's opinion is primarily a lengthy reconsideration and an attempted rationalization of the few things in the instant record that were mentioned by the trial court.

acted upon the appeal (137 F. 2d 722, 727, 728), but instead of deciding the only issue that was properly before the court—that of invention—it merely struck out the holding of invalidity without formally ruling upon it and passed instead upon the issue of infringement. Rule 52(a), F. R. C. P., was then in force, and it would therefore be reasonable to conclude that the appellate court doubted the soundness of the lower court's holding of invalidity; otherwise the appellate court would not have disturbed this finding and ruled instead upon an issue regarding which the lower court had made no findings at all. The opinion of the lower court did, however, state that the accused structures contained the patented combination, but the ruling of the appellate court was to the effect that infringement of the claims had been avoided by using a plunger instead of a lever to operate the combination—although none of the claims called for a lever and two of them included no operating member of any kind.

The next decision that came up on appeal was the unpublished decision of the United States District Court for the Western District of Oklahoma in *Leishman v. The Richards and Conover Company,* Civil Action No. 2155, which held the claims valid and infringed by devices patentwise identical to those held not to infringe by the Court of Appeals for the Ninth Circuit. The Court of Appeals for the Tenth Circuit indicated that the claims, if valid, would be infringed, but it followed neither its lower court nor the Court of Appeals for the Ninth Circuit on the issue of validity. It went back to Judge Harrison's origi-

nal opinion and uncritically copied parts of his opinion almost verbatim—including the obvious errors. These errors were pointed out to the Court of Appeals for the Tenth Circuit in a petition for a rehearing, which was granted; but instead of correcting these embarrassing errors, the appellate court then made a purported mathematical analysis of the problem solved by the patent here in suits and contended that a skilled mechanic would readily arrive at petitioner's solution by the route charted by the appellate court.

In the decision of the Court of Appeals for the Ninth Circuit in the instant case, a brief explanation is given of the analysis made by the Court of Appeals for the Tenth Circuit, but there is no word indicating agreement with this analysis. The opinion says, rather, that whether or not petitioner's solution of the problem "is explainable as indicated in the diagram" made by the Court of Appeals for the Tenth Circuit "is not of particular importance here" because petitioner's solution may be explained in some other way. [R. 1200.]

If the Court of Appeals for the Ninth Circuit in the present case had stated that it agreed with the analysis made by the Court of Appeals for the Tenth Circuit and that the claims were invalid for this reason, the over-all situation would appear in an entirely different light; and regardless of how wrong the courts might be, it is doubtful that the present petition would have been filed.

But when the Court of Appeals for the Ninth Circuit decides the case on still a different basis and arrives at a

conclusion that is inconsistent with facts stated right in the opinion and attaches controlling significance to expert testimony given on direct examination that was completely refuted on cross-examination, a petition for a writ of certiorari is clearly in order.

Intermingled with the aforementioned litigation, there was another suit that added still more confusion to the situation. The two manufacturers of the products that were declared to be infringements in the aforementioned Oklahoma action, asked the United States District Court for the Southern District of California for a summary judgment of noninfringement based upon the decision of the Court of Appeals for the Ninth Circuit in the aforementioned *Associated Wholesale* case. Although this district court had stated through a different judge in the *Associated* case that a patentwise identical structure *contained* petitioner's combination, it now granted the requested summary judgment of noninfringement, and this was affirmed by the Court of Appeals for the Ninth Circuit which stated that the lower court was bound by the appellate court's earlier opinion. (167 F. 2d 890, at 892.)

This summary judgment of noninfringement was won by Radio Condenser Company and General Instrument Corporation on the theory that petitioner's combination applied only to *lever*-operated devices and that their product was operated by a plunger which was not a mechanical equivalent of a lever. Yet an attorney for one of these firms had urged before the Patent Office that levers and plungers had long been known as mechanical equivalents

for operating devices of this kind. These concerns, subsequently convicted of violating the Sherman Act because of illegal patent activities involving these devices (87 Fed. Supp. 157) have had a finger in all the litigation respecting this patent. They constructed special models that were used in the Oklahoma case [P. 175 of *Richards and Conover* record]; a documentary exhibit used against the patent in the early *Associated* case was supplied by an attorney for these concerns [Deft. Ex. C in that case]; and this same exhibit was the first exhibit introduced by respondent in the trial of the present action. [R. 695.]

There have been violations of the applicable Supreme Court decision and peculiar departures from the accepted and usual course of judicial proceedings in all but two of the aforementioned opinions.

It is advisable but impossible to point out the flaws in the various erroneous decisions in the limited space of a brief of this nature. This is a constantly increasing difficulty that plagues your petitioner. If he confines himself to the facts and the law with respect to the case at hand, and deals but little with the past, he never knows what erroneous but unrefuted statement in a previous decision may be unearthed against him. It is believed, however, that this Honorable Court will prefer that the present brief be largely restricted to the errors in the opinion sought to be reviewed, and that plan will be used in the following discussion of the Reasons Relied Upon for the Allowance of the Writ.

B. The Facts and the Law Supporting the First Reason Relied Upon for the Allowance of the Writ.

In support of the first reason relied upon for the granting of the writ, petitioner explained generally how the court had failed to follow the doctrine expressed by this court in *The Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corporation, supra,* and mention was also made of this court's opinion in *Expanded Metal Company v. Bradford, supra.* In the latter opinion this Honorable Court said (214 U. S. 366, at 381):

> "* * * It may be safely said that if those skilled in the mechanical arts are working in a given field and have failed after repeated efforts to discover a certain new and useful improvement, that he who first makes the discovery has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor."

In the instant case many skilled workers in the art were endeavoring to discover a certain new and useful improvement—namely, an automatic radio tuner that would be easy to adjust or "set" without having all the extra parts used in the Zenith-Schaefer tuner described in the Schaefer patent, a copy of which will be found in the record beginning at page 789. But of those who worked on this problem the appellate court mentions only Marschalk. The Summary Statement of Matter Involved explains that the engineers of plaintiff General Motors Corporation also tried to simplify this tuner; but there were still others. A brief reference to what the record shows regarding their failure will demonstrate wherein the appel-

late court has ignored this Honorable Court's decision in the *Expanded Metal* case, and references to the appellate court's statements regarding the Zenith-Schaefer tuner will show wherein the whole of petitioner's far simpler combination "exceeds the sum of its parts," as required of a patentable combination in this court's *Supermarket* decision which the appellate court has disregarded.

The appellate court explained the "setting" difficulty that Marschalk encountered when he "undertook to simplify the Schaefer device * * *" [R. 1197], and the court referred to this difficulty as "creeping." [R. 1188.] The appellate court's excellent description of "creeping" and of the "setting" process will help this Honorable Court to understand the nature of petitioner's creep-free simplification of the Zenith-Schaefer tuner, and when this is understood it will be possible more fully to demonstrate the conflict between the appellate court's opinion and the applicable decisions of this Honorable Court.

In tuners of the type involved in this suit, each button or key is provided with a part known as a *tappet;* and the station that will be tuned in by the operation of a particular button is determined by the *setting* or adjustment of its tappet.

The court explains the "setting" of Marschalk's tappet (see Marschalk's Fig. 14 on p. 17 hereof) and the *creeping* difficulty as follows [R. 1189 *et seq.*]:

> "The creeping difficulty mentioned occurred when the thumbscrew for adjusting the tappet was loosened and the tappet was moved down against the rocker whose position had been fixed by the hand setting of the tuner, the rocker being attached to the revolving shaft used for that purpose. As the tappet was

brought down upon the rocker thus positioned, the object was to permit the flat side of the loosened tappet to come against the rocker and assume the precise angle of the rocker. The thumbscrew would then be used to tighten the tappet into that position so that thereafter when the lever was pressed downward, the then rigid tappet would come against the rocker in whatever position it had then assumed, and by pressure, bring it back to the precise position in which it was when the setting occurred.

"In actual operation it was found that the Marschalk device was very difficult to set accurately for the reason that when the loosened tappet was brought down upon the positioned rocker and some pressure applied to bring the two snugly together, the rocker had a tendency to 'creep' or permit 'play.' This was particularly true when the rocker was in a position diagonal to the horizontal, and the creeping tendency was very much less, or almost non-existent, if the adjusting operation was undertaken when the rocker was in such near-horizontal position. The creeping would destroy the possibility of efficient setting or adjusting for the reason that the radio receiver must be set precisely on the right point on the dial in order to obtain good results."

The court makes it clear that this creeping difficulty had been eliminated in the Schaefer tuner which Marschalk undertook to simplify. On page 1197 the court says that "in the Schaefer device, creeping is avoided because of the attained equilibrium." To attain this equilibrium, however, Schaefer used a considerable number of extra parts.

The desirability of simplifying the abandoned Zenith-Schaefer tuner [R. 789] is at once apparent from the ap-

pellate court's own discussion of the extra parts that it included. The court's opinion contains an illustration of a portion of the Zenith-Schaefer tuner [R. 1193] from the Schaefer patent [found on page 789 of the record], and in referring to the parts by number the court says that "the rotatable member or shaft which sets the receiver is 9." This shaft 9 is the thing in the Zenith-Schaefer tuner [R. 789] which, like the rocker in Marschalk's attempted simplification, must be brought "back to the precise position in which it was when the setting occurred," as the court explained, if the station is to be tuned in properly. Instead of having the adjustable tappet directly engage the rotatable member as Marschalk had done, Schaefer interposed a group of extra parts between his tappet and the rotatable member.[2] The

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[2]Tappets had been used ever since 1883 to position rotatable shafts, and it had *always* been the practice to have the tappet directly engage the rotatable member. But these tappets were never adjustable. In clock-setting devices they were always used to set the minute hand directly on the hour, and in cash registers there were ten keys each with a *fixed* tappet to turn a number wheel so that any one of the figures from 1 to 9 or a zero would appear according to which key was depressed. The 1883 Kettell patent [R. 817] and the 1897 Woodbridge patent [R. 713], cited by respondent in the complaint [R. 7], are representative of the old structures using fixed tappets that directly engaged the rotatable member that had to be positioned. In *Leishman v. Associated Wholesale Electric Co.*, 36 Fed. Supp. 804, 808, Judge Harrison said:

> "* * * Cash registers use a rocker and tappet as demonstrated by the Woodbridge and Miller patents * * *" and he explained that "the problem before any person desiring to adapt a rocker and tappet to a radio tuning device was to develop a means for an accurate and simple method of adjusting the tappet. * * *"

But any experimenter attempting to use an adjustable tappet would encounter the peculiar creeping difficulty that Marschalk found. To produce equilibrium in such devices in order to eliminate the creeping difficulty, Schaefer as well as other inventors interposed extra parts between the adjustable tappet and the rotatable member. [R. 142-146.]

opinion says [R. 1196]: "We think it is not material here but in our view, since the racks and cross bars on each side make two rectangular frames, each shaped somewhat like a honey-comb frame, or a box without top or bottom, it would be more accurate to say that the extra parts were the two frames and the two gears, making a total of four." Each frame, however, as the court's explanation shows, is made up of two racks and two cross bars, or a total of four actual parts that had to be stamped out and attached together. The two frames are thus formed of eight parts, and these, with the two gears mentioned by the court, make a total of ten. These ten, with "the two sets of four guides" earlier recognized by the court, make a grand total of 18 extra parts.

When Marschalk tried to simplify the complicated Schaefer device [R. 789] by omitting these extra parts he encountered the creeping trouble that Schaefer had successfully avoided—and Marschalk's tuner, as the opinion tells us, "proved unsatisfactory because of difficulty of avoiding 'creeping' * * *." [R. 1188.]

Had the Zenith engineers known how to get along without so many parts in the Zenith-Schaefer tuner [R. 789], it is obvious that they would have simplified the device instead of abandoning it, and the court itself tells us that Marschalk's attempted simplification was a failure.[8]

It was mentioned in the Summary Statement of Matter Involved that the engineers of respondent General Motors

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[8]Strange as it may seem, the Schaefer and Marschalk tuners, which the appellate court has used to illustrate the problem of simplification that faced the industry, were cited by the trial court as *anticipations* of petitioner's *solution*. This is typical of the contradictions, absurdities and lack of judicial care that have characterized the thirteen years of litigation in which this patent has been involved.

Corporation also tried to simplify the Zenith-Schaefer tuner.[4] Engineers of the Crosley Corporation likewise tried to produce a simpler tuner than Schaefer had done.[5]

When petitioner undertook to simplify the Zenith-Schaefer tuner, he concluded that all difficulties could be avoided *without interposing any extra parts whatever* between the tappet and the rotatable member that controls the tuning *if the rotational axes of these two members, during the time of engagement, could be made to fall on a common line.* [See drawing on page 13 hereof and Fig. 2 of the patent here in suit, R. 775.] The tappet could then be permitted to come into direct contact with the rotatable positionable member just as had been done in cash registers and clock setting devices in which the tappets were never adjustable. It was when attempts were made to provide adjustable tappets that experimenters encountered the creeping problem[6] due to the peculiar lack of

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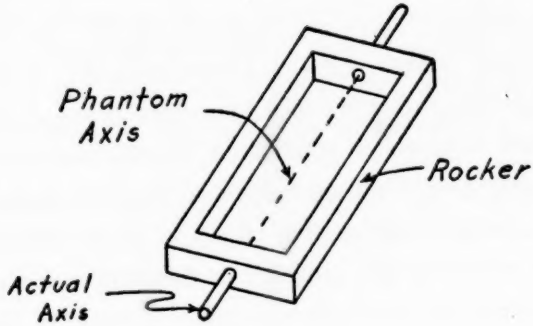
[4]A brief account of General Motors' efforts along this line appears later in this brief.

[5]The Crosley Corporation's chief research engineer, Mr. Kilgour, testified that Mr. Crosley was familiar with *the old Zenith tuner* but wanted something better [R. 486] and that one of the Crosley engineers "worked all summer and in the fall [of 1937] we decided to go into production on his device, *but it seemed to be a rather difficult one to work out practically* * * *." [R. 504, emphasis added.] In their dilemma their patent attorneys wrote petitioner [R. 1063] advising him on October 25, 1937, that Mr. Fred Johnston of The Crosley Radio Corporation had requested a report on petitioner's patent No. 2,084,851, the file wrapper of which contained the original drawings and description of petitioner's simple structure here in suit which the Crosley Corporation immediately adopted. [R. 217-219.]

[6]See footnote 2 of this brief.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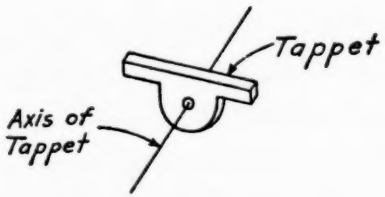
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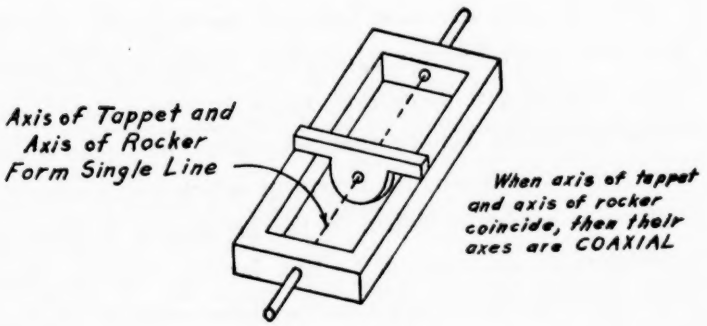
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equilibrium or balance that developed—and no one knew of a way to establish equilibrium and avoid creeping without interposing a lot of parts between the tappet and the rotatable member. The engineers of both the Zenith Corporation and General Motors Corporation did it in that way. But petitioner concluded that extra parts would not be required to establish equilibrium if the rotational axes of these two members were made coaxial in the completely engaged position. Since two objects cannot both occupy the same space at the same time, this required shaping them so that one could nest within the other in the engaged position.

Petitioner's simple coaxial tappet and rocker combination completely removed the difficulty that had stumped Marschalk and required all the extra parts in the Zenith-Schaefer device as well as in the simplification designed by General Motors to which reference will presently be made.

Had the appellate court followed the applicable test of invention given by this Honorable Court in *Expanded Metal Company v. Bradford, supra,* it would have concluded from this history that petitioner "has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art and is entitled to protection as an inventor." But instead, the appellate court ignored the meaning in the demonstrated inability of all these engineers to arrive at petitioner's solution and said [R. 1201-2]:

> "This court * * * has come to the conclusion that a mechanic skilled in the art, on examining the Marschalk device, would immediately observe that the solution of the problem would have to be obtained by procuring the required equilibrium and would note that the way to accomplish that would be through making the tappet and rocker coaxial."

It is clear, however, that Marschalk made no such observation, yet his patent [R. 822] shows that he was far more than a skilled mechanic. Marschalk brought his tappet directly into engagement with the positionable member as had always been done with devices using non-adjustable tappets, and he got into trouble by trying to make his tappet adjustable.[7] Schaefer and the General Motors engineers solved the problem in a complicated way by interposing extra parts. Marschalk's device has significance only because it exhibits the problem in the raw: he had no solution of any kind to offer.

The practical history of the art thus proves that the appellate court is wrong in its conclusion that any mechanic skilled in the art would arrive at petitioner's solution of the difficulty exhibited in Marschalk's device. Practical and perfect proof of the appellate court's error is contained in the Crosley Corporation patent on the Lane and Mackey tuner [R. 842]. A copy of this patent is attached to the inside back cover of this printed brief.

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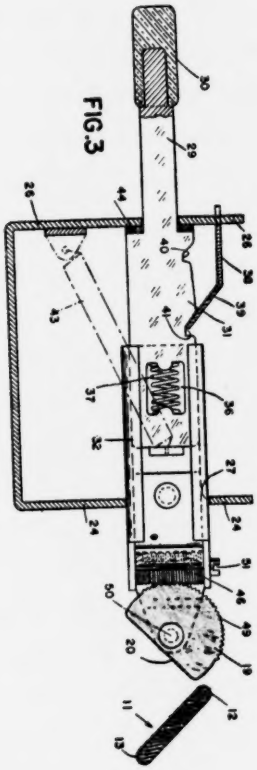
[7]See footnote 2 on page 10 of this brief.

A reproduction of Fig. 3 from the Crosley patent appears on the opposite page above Fig. 14 from Marschalk's patent. [R. 824.] Lane and Mackey's Fig. 3 has been turned on its side for easier comparison with Marschalk's device. The tappets in each case have been colored red and the rockers green. Contrary to the appellate court's "conclusion that a mechanic skilled in the art, on examining the Marschalk device, would readily observe" that the difficulty could be cured "through making the tappet and rocker coaxial" [R. 1201-2], these engineers have provided a very complicated way of circumventing the difficulty. Instead of arriving at petitioner's simple method of eliminating the creeping that normally occurs when a freely pivoted tappet is pressed into engagement with a tilted rocker for adjustment purposes, Lane and Mackey devised a plan for adjusting the tappet without ever having to loosen it.

These two engineers, it will be observed, have taken Marschalk's tappet and placed a series of teeth 49 around its periphery and arranged a micrometer worm wheel 46 in engagement with these teeth. To adjust the tappet to the precise angle occupied by the rocker when the desired station is tuned in, the tappet is first pressed against the rocker which then initially assumes the angle to which the tappet was *previously* adjusted. While the tappet is held in firm engagement with the rocker, a screwdriver is inserted in the groove 51 in the end of the shaft of the worm wheel. This shaft and the attached worm wheel may be turned by the screwdriver, and for each complete revolution of the worm wheel the tappet is turned an amount represented by the distance between adjacent teeth on the tappet's periphery. If the tappet is kept against the rocker during this process, the rotation of the screw-

FIG. 3



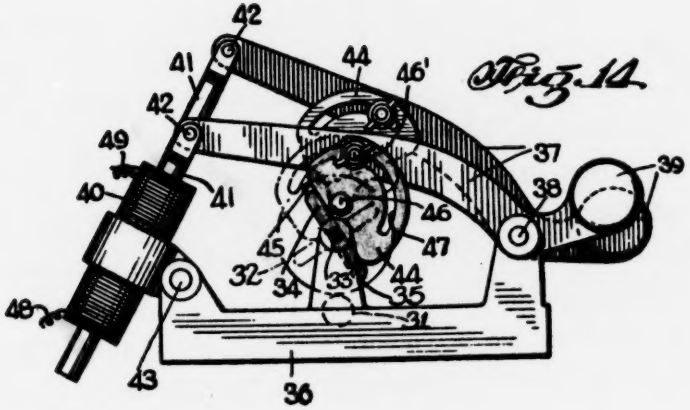


Fig. 14

driver may be used to tune in the desired station, because the rocker is attached to the tuning shaft of the radio receiver. The tappet will then of course be in the same angular position as the rocker, and the worm wheel will hold it there. The adjustment of the tappet is consequently completed when the desired station is thus tuned in.

But the adjusting process is so slow and tedious in this device that Lane and Mackey provide a latch 39 which may be used to lock the tappet against the rocker so that it will not be necessary to hold it there manually while the tappet and rocker are being rotated by the screwdriver. The bottom end of the plunger that carries the tappet moves up and down during this adjusting process, and to keep the outer end of the plunger in the same position regardless of the movement of the inner end, the plunger is made in two pieces with a spring 36 in the middle to take up the slack.

While Lane and Mackey's total arrangement avoids the creeping difficulty manifest in Marschalk's device, it is vastly more complicated than petitioner's simple answer. Certainly no mechanic skilled in the art would add such complexities to Marschalk's structure if such mecanic "on examining the Marschalk device, would immediately observe that the solution to the problem * * * would be through making the tappet and rocker coaxial," as the court tells us. [R. 1201-1202.] Here were *two* skilled workers tackling the problem together, and petitioner's arrangement did not occur to either one of them. And it did not occur to Marschalk himself. The actual experi-

ence of these three skilled artisans is practical proof that the appellate court was wrong in saying that "a mechanic skilled in the art, upon examining Marschalk's device, would immediately observe" that the problem could be solved in the way petitioner solved it.[8]

Judicial findings, where the evidence is available, should be based upon demonstrated facts and not upon demonstrable fiction.

A brief account of General Motors' attempts at simplifying the Zenith-Schaefer tuner have been left till the last, because their efforts not only add to the proof of invention on petitioner's part under the test given by this Honorable Court in the *Expanded Metal* case, ***supra,*** but the complexities in their final result as compared to that of petitioner can leave no doubt that petitioner's combination qualifies as an invention according to the standards given in this Honorable Court's opinion in the *Supermarket* case, ***supra.***

The simplification developed by the General Motors engineers was on the market for a while, and one of the units was introduced at the trial as Plaintiff's Exhibit 3. Regarding the project that culminated in this tuner, Gen-

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[8]No expert witness opposing the patent has ever been asked on direct examination to explain how to analyze the peculiar imbalance demonstrated in Marschalk's device. Knowing that such an attempt would reveal the obscurity of the reasons for creeping, petitioner's counsel John Flam on cross-examination asked Dr. Spotts, who was opposing the patent in the *Richards and Conover* suit, to make such an analysis for the court, and the explanation that he gave was easily shown to be erroneous. (See pages 13 to 17 of Petition for Rehearing of Order on Petition for Writ of Certiorari, No. 612, October Term, 1948.)

eral Motors' chief radio engineer Schwarz explained [R. 410]:

> "We started work on this in the latter part of 1936 or the first part of 1937, on the idea of mechanical push button tuners and electrical push buttons for automobile radios."

Between 1936 and the time the Exhibit 3 tuner went into production in 1938 [R. 410], design work on automatic tuners was carried on at the Delco Radio Division of General Motors by James G. Funk [Pltf. Ex. YY, R. 31], Howard M. Stelzl [Answers to Interrogatories 10 and 12, R. 31-32], William C. De Roo [Answers to Interrogatories 16 to 18, R. 32-33], and Raymond A. Shuttleworth [Answers to Interrogatories 19 and 20, R. 33], but the final product that went into production was largely devised by Mr. Schwarz [R. 336], who was chief engineer. [R. 329.]

Schwarz explained that General Motors thought it had made an improvement over Schaefer by reducing the number of parts through which the motion is transmitted from the tappet to the rotatable member, or pinion shaft. He testified [R. 337-338]:

> "* * * We felt at liberty with our design, *with what we considered some improvements,* because of the existence of the Schaefer tuner, *which we studied at the time* and knowing it was available to us. You have [in the Schaefer tuner] just the two racks on this side and two racks on that side, cooperating by connecting bars [of which there were

four], whereas on *our* tuner we have *separate racks* for *each* station, that is a rack here and a rack there (indicating), and then when you push each one you move *the single pair of racks.* And you have a single pinion going through just as have a single pinion going through on that one [Schaefer's], or a pinion shaft." (Emphasis added.)

The "pinion shaft" mentioned by Schwarz corresponds to the two gears in the Schaefer tuner, which with the four racks and four cooperating bars made a total of 10 movable parts interposed in the Schaefer device between the tappet and the rotatable member, but Schwarz explains that he uses a separate pair of racks for each station, or button. That still makes 10 extra parts for a five-button tuner. But he forgot that each rack had a lug spot-welded to it that of course had to be separately stamped out. The tappets in the General Motors tuner engage the lugs that move the racks that position the pinion. When the lugs are counted, as they must be since they are separately manufactured and separately attached parts, there are thus *twenty* extra parts in the General Motors tuner as compared to *none* in petitioner's combination where the tappet directly engages the rotatable member without any creeping and without any intervening parts at all.

Though some of the nation's best engineering brains thus failed to effect the desired improvement, your petitioner got along without the entire equilibrium-producing structures of the Zenith and General Motors tuners, with

their numerous extra parts, simply by *making over* the two basic members and changing the relative position of their axes.[9]

Petitioner's combination thus clearly meets the test set forth in this Honorable Court's opinion in the *Supermarket* case, as follows: "The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable." The sum of the parts in petitioner's combination is only three even if we include the spring that holds the parts normally apart. But the whole exceeds this sum and produces a result that previously required many extra parts (18 more in the Zenith-Schaefer tuner and 20 more in the General Motors tuner that petitioner's structure displaced). "Two and two have been added together," to borrow this Honorable Court's figure of speech in the *Supermarket* case, and this time they make about twenty.

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[9]As soon as a knowledge of petitioner's combination became publicly available, the radio industry began its avid adoption. The Crosley Corporation was the first to abandon other structures and adopt the coaxial tappet and rocker arrangement. [R. 217-219.] General Instrument Corporation and Radio Condenser Company soon followed suit. [R. 221, 229-230.] After having discarded its own Schaefer tuner a decade earlier, the Zenith Corporation also adopted petitioner's vastly simpler construction, purchasing the complete units from petitioner's own licensee. [R. 225-226.] Zenith later tried a tuner of a totally different type, but in May, 1948, it returned to petitioner's structure [Deft. Ex. GGG] with the public announcement [R. 1140] that "This system is so simple and fool proof, that complete replacement should seldom, if ever, be necessary." Respondent General Motors Corporation abandoned its own simplified but still complicated version of the Schaefer tuner, adopted petitioner's coaxial tappet and rocker construction, used it in a million tuners, and filed this Declaratory Judgment suit asking the court to hold that petitioner's combination involved only mechanical skill—although it was obviously beyond the skill of its own engineers.

It would be difficult to find a more classic example of a device that thoroughly meets the test set forth in the *Supermarket* opinion, but the appellate court ignores both the opinion and the test.

In *Landis Machine Company et al. v. Parker-Kalom Corporation et al.*, 190 F. 2d 543, 546, Judge Learned Hand, in his last patent opinion stated:

> "* * * The issue is always how far beyond commonplace contriving was the foresight necessary to think out the combination. Usually, though not always, it is practically impossible to decide that issue by a mere inspection of the patented disclosure against the background of the prior art. Moreover, it scarcely needs more than the statement of the question to disclose the fatuity of asking judges, undisciplined in the craft and untutored in its inarticulate presuppositions, to say how far the innovation is beyond the powers of merely competent craftsmen. For that reason we have over and over again resorted to the history of what went before, the duration of the period during which the invention was needed but failed to appear and its acceptance when it did. These circumstances have seemed to us, not indeed an absolute determinant of invention, for there is none; but at least the best, and indeed almost always the only, rational approach to a solution."

And the Court of Appeals for the Second Circuit sent the case back to the lower court to see if such evidence could be obtained. In the instant case, this type of evidence was already before the court.

In *Graver Tank & Manufacturing Co., Inc. v. Linde Air Products Co.*, 70 S. Ct. 854, 856, this Honorable Supreme Court said: "Equivalence * * * is not an abso-

lute to be considered in a vacuum." This could be said with even greater force of *invention.* If it is fatuous, as Judge Learned Hand thinks, to ask a court to decide the issue of invention without such practical facts as were before the Court of Appeals for the Ninth Circuit in the instant case, how much more fatuous is it for the court to ignore such facts and retire into a vacuum to decide the issue? Just how fatuous it is will appear from the discussion of the next reason relied upon for the allowance of the writ.

C. Data Supporting Petitioner's Second Reason Why the Writ Should Be Granted.

The second reason why the writ should be granted was expressed broadly in one sentence as follows:

> *"The appellate court in deciding the issue of invention has not exercised the care which this Honorable Supreme Court has admonished the lower courts to use, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision."*

The petition mentioned three incidents demonstrating the appellate court's serious departures from the accepted and usual course of judicial proceedings.

a. Testimony Relied Upon by the Appellate Court but Property Ignored by the Trial Court Was Controverted on Cross-Examination.

The appellate court apparently realized that its own account of Schaefer's complexities and Marschalk's difficulties were contradictory to its assertion that only mechanical skill was involved in petitioner's solution of how to eliminate creeping without using a lot of parts besides

the tappet and the rotatable member that is to be positioned. At any rate, the court supports its unrealistic holding by contending that it is prohibited from overruling the trial court because of certain testimony of respondent's expert which the trial court had the exclusive opportunity of hearing. The testimony referred to by the appellate court was given on direct examination by respondent's chief radio engineer Schwarz, and it is typical of the serious carelessness of the appellate court that it did not bother to determine whether this testimony held up on cross-examination or had influenced the trial court in any way. The appellate court's opinion says [R. 1202-3]:

> "* * * the trial court had the exclusive opportunity of listening to the oral testimony which dealt with this principle [which petitioner used to avoid creeping]. Thus it was testified by one of appellee's engineers that the engineering principle which lies behind the coaxiality here involved, was the principle of symmetry or concentricity, long known to machine designers as a means of avoiding moment arms. The testimony thus given appears to us to be reasonably credible and to mean that the principle which was applied by appellant is one designed to eliminate the moment arm through the establishment of symmetry, equilibrium or balance. We think therefore that this particular finding must be held to be the result of a determination of a question of fact, which cannot be said to be clearly erroneous, and that Rule 52(a) Federal Rules of Civil Procedure prohibits us from disturbing it."

A mere reading of the lower court's opinion reveals that no mention whatever is made of the said testimony, which was given by respondent's chief radio engineer Schwarz,

nor is any reference whatever made to the said engineer himself either in the decision or in the findings of fact. And for a very good reason. The testimony which the appellate court says "appears to us to be reasonably credible" were all made in Schwarz' carefully prepared, self-serving, direct testimony, and it did not seem credible at all to the trial court *because it was exploded on cross-examination.* Thus:

"Q. (By petitioner's attorney John Flam): Will you answer whether you have ever made parts coaxial in order to prevent movement of one of the parts? A. (By respondent's engineer Schwarz): *I cannot think at this moment of an instance.*

Q. Can you think of any example of one in which movement of both parts is prevented after they have become coaxial?

* * * * * * * *

The Witness: May I hear the question again?

(The question referred to was read by the reporter as follows: 'Can you think of any example of one in which movement of both parts is prevented after they have become coaxial?')

The Court: Movement of both parts?

Mr. Flam: Yes.

A. *I am sorry, I can't at this moment.*

Q. (By Mr. Flam): Then, so far as you know, this arrangement shown in the Leishman patent and as exemplified in these exhibits is unique, you haven't been able to find anything prior to 1937 like it, is that right? A. I haven't testified to the fact that I have seen this device presented to me as coaxiality. I don't believe that I could say that as of 1937 or 1938 or 1939 was the beginning of seeing this device as a unique one.

Q. Prior to 1937 you saw no device, then, in which the principle or relationship of the parts utilized coaxiality to prevent any movement of one or both of the parts that become coaxial. A. *I cannot think of an instance at this moment.*" [R. 429-430; emphasis added.]

Instead of coaxiality being "long known to machine designers as a means of avoiding moment arms" (that cause turning), as this witness had testified on direct examination, he thus could not think of a *single* instance, when pinned down on *cross*-examination, in which a coaxial relationship had ever been used for such a purpose.

The fact that a coaxial relationship between parts had never before been used to stop unwanted rotation was thus established by respondent's own expert witness and chief radio engineer[10]—a man who, moreover, had himself super-

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[10]The unprecedented nature of petitioner's use of a coaxial relationship was also confirmed by the expert witness opposing the patent in the *Richards and Conover* case. This witness was Dr. Spotts, Associate Professor of Machine Design at Northwestern University. On cross-examination he testified:

"Q. [By Mr. Flam]: Do you know of any device where a freely pivoted member presses on another freely pivoted member, both members being on separate pivots, in which movement between them is prevented by making them coaxial in a fully engaged position?"

(Dr. Spotts at first did not grasp all of this question. Mr. Flam's clarification and Dr. Spott's answer were as follows:

"Q. Here we have two relatively movable bodies on separate axes and when they are brought together in full engagement there is some relative movement which is prevented by bringing the axis of one into the axis of the other. Do you know of *any* such device? *If you do I would like to hear about it?* A. *I don't believe I know of any.*" [Pp. 195-196 of the *Richards and Conover* record, filed by respondent herein, emphasis added.]

The district court in the *Richards and Conover* case made the following finding on this point:

"14. The defendant presented no example of the use of a coaxial relationship that was at all analogous to the use made

vised a group of engineers in a research program that resulted in a tuner with many extra parts when they attempted to simplify the Schaefer device. Had Schwarz or the other General Motors engineers known of any prior use of a coaxial relationship for the prevention of rotation, they would themselves have arrived at petitioner's structure instead of the more complicated device which they later abandoned in favor of petitioner's combination.

Schwarz' admissions on cross-examination as to the unprecedented nature of petitioner's use of a coaxial relationship should alone have been determinative of the issue of invention.[11] But it is utterly useless to cross-examine witnesses if the appellate court, as here, looks no further than the carefully prepared, self-serving, direct testimony of the witness and then says that because of

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of this relationship in the combination set forth in the claims of the reissue patent in suit; and defendant's expert, Dr. Spotts, stated on cross-examination that he knew of no instance in which a coaxial relationship had been previously used for a similar purpose." [*Richards and Conover* record, p. 30.]

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[11]A complete case as to the presence of invention in petitioner's combination was actually made out from General Motors sources alone: Schwarz testified that respondent's own complicated tuner [Pltf. Ex. 3] resulted from an attempt to simplify the Schaefer tuner; the answers to interrogatories revealed that five men were working on the General Motors tuner project; Schwarz admitted that the G. M. simplification of the Schaefer tuner had been abandoned in favor of petitioner's simpler construction; Schwarz testified that petitioner's construction had been used in more cars than all previous types of tuners combined; and Schwarz admitted that he knew of no analogous use of a coaxial relationship anywhere.

In a similar situation, this Honorable Court said:

"The plaintiff's case as presented on the record is largely the presumption of validity and novelty attaching to the patent and such evidence as comes from defendant's witnesses. A case that can be made out in all its elements by cross-examination of opposing witnesses is a strong case." *Eibel Process Company v. Minnesota and Ontario Paper Co.*, 261 U. S. 45, at 53.

such testimony and Rule 52(a) it cannot overrule the trial court.

Instead of the Schwarz' testimony creating a situation in which the trial court could not be overruled because of the provisions of Rule 52(a), it created an opportunity to show through cross-examination that petitioner's combination meets *all* the tests of invention applied by this Honorable Court in *Jungersen v. Ostby and Barton Company,* 335 U. S. 560.

In this connection, other portions of this brief have shown a situation similar to that recognized by Mr. Justice Jackson in his dissenting opinion in that case where he said (p. 571):

> "* * * but Jungersen's success was grounded not in the gullibility of the public but in the hard-headed judgment of a highly competitive and critical if not hostile industry. Knowing well its need for and its failure to achieve improvements on available processes, that industry discarded them, adopted this outsider's invention and made it a commercial success."

Of Mr. Schwarz' direct examination, no comment is more appropriate than the following quotation from the previous opinion of Judge Learned Hand which Mr. Justice Frankfurter and Mr. Justice Burton adopted as their own (p. 570):

> "* * * If all the information was at hand, why was the new combination so long delayed? What better test of invention can one ask than the detection of that which others had all along had a strong incentive to discover, but had failed to see, though all the while it lay beneath their eyes?"

But the majority held that Jungerson's claimed improvement was not patentable because (p. 566):

> "* * * Where centrifugal force was common as a means of introducing molten metal into the secondary mold, its use in an intermediate step to force molten wax into the primary mold was not an exemplification of inventive genius such as is necessary to render the patent valid. * * * The patentee himself admitted that the same principle was employed in both steps. Thus Jungersen employed in his claimed invention well known skills and practices *in a manner and for a purpose long familiar in the field of casting.*" (Emphasis added.)

In the instant case, the cross-examination of Mr. Schwarz showed that he knew of no instance anywhere in which a coaxial relationship had ever been used *in the manner* in which petitioner used it *or for any similar purpose* in the field of automatic tuning *or anywhere else.* And Dr. Spotts testified to the same effect in *The Richards and Conover* case, as shown in footnote 10 of this brief.

It is thus manifest from the cross-examination of expert witnesses opposing the patent that petitioner's combination meets *all* the tests of invention applied in the *Jungerson* case.

It would go a long way toward the clarification of the law with respect to invention if this Honorable Court were to pass upon this case where so many tests of invention may be *affirmatively* applied. The tests of invention given in the *Supermarket* case, *supra*, have already been shown to be *affirmatively* applicable here.

b. An Engineering Observation Made by the Court of Appeals Is Shown to Be in Error by the Testimony of a Witness Quoted in the Opinion.

In another part of the opinion the appellate court relies upon an engineering observation of its own making, and in this instance the court was so careless that it did not notice that its statement was a direct contradiction of the testimony of an expert who opposed the patent and whose pertinent statement the court had already quoted with apparent approval.

The trial court, it will be remembered, had erroneously held that Schaefer and Marschalk anticipated petitioner's contribution. In an effort to uphold the trial court with respect to Schaefer, the appellate court says [R. 1196-1197):

> "* * * We think that it is manifest from the exhibits that the trial court could fairly conclude that the principle which prevents creeping in the Schaefer tuner is the principle of equilibrium or balance,[12] and that creeping does not occur for the simple reason that when the specially shaped tappet 56 is pressed firmly in position upon the arms or cross bars 32 and 34, the pressure upon each arm is identical. It is true that the arms move up and down upon the racks instead of rotating, but *basically the desired result is obtained because the tappet is so shaped and located that an imbalance is not possible.*" (Emphasis added.)

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[12]No judicial conclusion of any kind was required as to the necessity of "equilibrium or balance" to eliminate creeping. Every worker in the art of course knew that from the outset. The problem was how to obtain the equilibrium or balance without using a lot of parts besides the tappet and the rotatable member that has to be accurately positioned.

Three paragraphs back in its opinion, however, the court had already quoted Dr. Spotts to the effect that the location of the tappet was immaterial to the operation of Schaefer's tuner. Dr. Spotts, Associate Professor of Machine Design at Northwestern University, was the expert opposing the patent in the *Richards and Conover* case. Regarding his testimony on this point the court says [R. 1195-6]:

> "The witness also testified that the round spot, No. 55 (the pivot of the Schaefer tappet), could be moved sidewise 'without any effect in the operation' of the Schaefer tuner, and that this could be done so long as 'you have lateral support for members 26 and 27. . . . Providing that did nothing more than make points 57 and 58 retain contact with the horizontal surface.'" (Omissions and parenthetical explanation by the court.)

If the pivot of Schaefer's tappet can "be moved sidewise 'without any effect in the operation' of the Schaefer tuner" providing the tappet "points 57 and 58 retain contact with the horizontal surface," then the location of the tappet is clearly immaterial to the desired result in the Schaefer tuner, and the court is obviously mistaken in saying that "the desired result is obtained because the tappet is so shaped and located that an imbalance is not possible."[18]

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[18]The first and second paragraphs of Dr. Spotts' testimony following the portion quoted by the court show that the location of the little tappet can be changed as much as a quarter of an inch without effecting the operation of the device; thus:

> "Q. [By Judge Chandler]: It [the center of Schaefer's tappet] could be moved anywhere on that line you have drawn across there? A. I don't mean over here (indicating).

It is the "lateral support for members 26 and 27" and *not* the location or shape of the tappet that Dr. Spotts stresses as essential in the testimony quoted by the court. The lateral supports are the four guides for these members. If the lateral supports are essential, then the members which they support must also be essential. These members 26 and 27 are component parts of the two frames previously mentioned by the court (see p. 11 hereof), these frames being formed of four parts each which require eight guides in all. The toothed frames mesh with, and move, the two gears previously mentioned by the court (p. 11 hereof). We thus get back to the fact that equilibrium is obtained and creeping prevented in the Schaefer tuner by means of the 18-part gear, rack and guide system and not at all by the location of the tappet or its pivot 55.

It is inexcusable for the court to express its own unsupported engineering opinion on an important point of this kind without even noticing that such opinion is contrary to its own quotation from the expert testimony of an authority who was opposing the patent.

Q. I understand, but a reasonable distance so it would not conflict with any of the other parts. Now if it is moved a quarter of an inch to the left of your line you say it would still work? A. Providing there is lateral guidance." [P. 192 of the *Richards and Conover* record, filed by respondent as part of the present record.]

Judge Chandler not only heard this witness testify, but did the cross-examining himself. Judge Chandler concluded that invention was involved in petitioner's simple solution of the creeping problem which eliminated all the extra parts from Schaefer's mechanism. His pertinent finding with respect to Schaefer was as follows:

"19. Schaefer, exhibit 20, Marschalk, exhibit 18, Lane and Mackey, exhibit 22, and Soffietti, exhibit 21, in Italy all tried to produce acceptable tuners using an adjustable tappet, but their tuners were all either more complex or much harder to adjust than plaintiff's [Leishman's] simple structure." [*Richards and Conover* record, p. 31.]

c. A Purported Model of a Portion of a Device for Recording Variations in the Amount of Carbon Dioxide in Flue Gas, Is Accepted by the Court as an Anticipation of Petitioner's Tuner, Although Clearly From a Non-Analogous Art, and Respondent's Witness Admitted Under Cross-Examination That the Model Departed From the Original Structure in Order to Simulate Petitioner's Combination.

The appellate court exhibits even greater carelessness in uncritically accepting the Cunningham patent as some kind of an anticipation. The court itself informs us [R. 1205] that "The Cunningham patent is a device for determining the amount of carbon dioxide in fluid gas [this should be flue gas] so that its automatic determination will record or control combustion in a furnace." Such a device would seem on its face to be from a totally non-analogous art, but the appellate court says that "A part of the patented device [Cunningham's] includes an apparatus for automatic shaft setting." But the kind of "automatic shaft setting" that takes place in Cunningham's device is entirely different from, and non-analogous to, the kind of automatic shaft setting that takes place in automatic tuners. In automatic tuners, the purpose is to automatically return a shaft precisely to the position that it previously occupied when the original setting took place. In Cunningham's device [R. 741] the shaft that is set is the shaft 58 [Figs. 1 and 9] that moves the recording pen 62, Fig. 2, or the shaft that controls the combustion in the furnace, and these shafts are re-set at regular intervals *not* in accordance with positions that they previously occupied, but in accordance with the amount of carbon dioxide then present in the flue gas that is going up the chimney. As the amount of carbon dioxide varies, it causes a float 38, Fig. 1, to move up or down, and Cunningham's device

is *to transmit* the movement of the float 38 to the recording pen 62 or to the shaft that controls the combustion in the furnace in order to get the greatest possible efficiency from the fuel and to prevent unburned gases from going up the chimney. Cunningham accordingly calls his mechanism a "Power Transmitting or Registering Device" [R. 741.]

In an earlier portion of the opinion the court explained that it is necessary in adjustable tappet tuners to adjust the loosened tappet to the exact angle assumed by the rocker when the desired station is carefully tuned in by hand, and the court explained that the creeping difficulty arose during this process. In the Cunningham device, the part 55 alleged to resemble the "tappet" is *never* adjusted to the position of the "rocker" 57, and the entire process in which creeping occurs in an automatic tuner is consequently absent. Since Cunningham thus never encounters the creeping problem, it obviously cannot be held that he anticipated petitioner in providing a simple solution.[14]

The appellate court says [R. 1206] that the lower court's finding about the Cunningham device "refers to the testimony of one of appellee's witnesses respecting a model constructed in accordance with the Cunningham patent and which was introduced in evidence at the trial." If the appellate court had examined this model and the Cunningham patent with reasonable care, it would have discovered that this model departed from Cunningham's device in very material respects. Parts that were essential for the normal

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[14]In *Leishman v. The Richards and Conover Company*, the court properly dismissed the Cunningham device with the significant statement: "You mean to say the question doesn't arise." [P. 82 of the printed *Richards and Conover* record filed by respondent in the instant case.]

operation of the mechanism were entirely omitted and other parts were added in order to make it perform a function for which it was never intended.[15] Such a device is not an anticipation, for this Honorable Court has held:

> "It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such function." (*Topliff v. Topliff,* 145 U. S. 156 at page 161.)

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[15]These alterations were so great that they were gradually conceived over a period of years by those opposing the patent. The continued alterations and their purpose were admitted by respondent's own expert, Dr. Mackeown, as follows:

> "Q. (By Mr. Flam): Dr. Mackeown, when was that model made, Plaintiff's Exhibit 11? A. Well, it was made excluding the gear mounted on the shaft, corresponding to shaft 58 of the patent, and the tuning unit. *The rest of the metal parts were made prior to the Associated case.* * * *" [R. 472; emphasis added.]

(The *Associated* case, here referred to, was the case of *Leishman v. Associated Wholesale Electric Company,* 36 Fed. Supp. 804, tried in 1940—8 years before the trial of the instant action.)

> "Q. When was the condenser and the gear added to that model? A. *Oh, something about a year ago.*" [R. 472; emphasis added.]
>
> "Q. The model, Exhibit 11, has no hammer or anything like that on it. When was that taken off of the model? A. Oh, that was taken off *a few days ago. It served no purpose in tuning a radio or positioning a tuning condenser of a radio set.*
>
> Q. But it was a very important feature of the Cunningham device, was it not, to adjust the wheel in accordance with the float? A. It was used for the purpose indicated in the Cunningham patent, 1930192, to position the wheel 55.
>
> "Q. Wasn't that a very important part of the Cunningham device, to position that wheel? A. *If you use it for measuring flue gas I think it would be, as Cunningham did, but not if you adapt this device for tuning a radio condenser.*" [R. 474; emphasis added.]

The representative errors here discussed are indicative of a carelessness that clearly calls for this Honorable Supreme Court to exercise its supervisory powers. In its opinion in the *Supermarket* case, *supra,* this Honorable Court admonished the lower courts to use great care in deciding patent cases, but this admonition was unheeded here.

In the *Supermarket* case, the carelessness of the lower courts was in holding an obviously invalid patent valid. It is at least just as serious to carelessly hold a valid patent invalid, for then the patent laws fail entirely to serve their constitutional end. After thirteen years of this sort of thing, in which three large corporations through Declaratory Judgment actions have appropriated his contribution to the advancement of the art, your petitioner feels that the patent system has become a snare and a double-cross. The inventor is induced to do his best by the constitutionally supported statutes that promise him a reward for advancing "the useful arts," but after he has spent his time and money in developing something novel and manifestly beyond mechanical skill, and which receives the tribute of almost universal adoption, he is told that the government's contract with him is no good and that the financial rewards are all to go to the big corporations that have exploited him. The patent laws are based upon the same constitutional provisions as the copyright laws; but the copyright laws are for some reason administered differently, and no author is forced to see his work published as anonymous by well known publishing houses that recognize no obligation to him.

D. Data Supporting the Third Reason Relied Upon for the Allowance of the Writ.

To make it unnecessary for the court to refer back to the Petition for the third reason relied upon for the allowance of the writ, the two paragraphs reciting this reason are here repeated.

3. There has long been a conflict between the Court of Appeals for the Ninth Circuit and three other courts including the Court of Appeals for the Tenth Circuit regarding whether a lever is a part of petitioner's patented combination, and the Court of Appeals for the Ninth Circuit has now ballooned its old untenable contention that a lever *is* a part of this combination into a primary reason for holding that petitioner's contribution does not meet the test of invention which it applied in *Pointer-Williamette Co. v. Six Wheel Corporation,* 177 F. 2d 153.

If this Honorable Court should resolve this conflict by recognizing that an operating member is not a part of the combination claimed in claims 7 and 8, and that the "manual operating member" or "manual operating means" called for in the other three claims does not have to be a lever, then the Court of Appeals for the Ninth Circuit could no longer hold that petitioner's combination does not meet the test for invention set forth in the *Six Wheel* case, *supra.* This would also automatically decide the issue of infringement.

In the eighth paragraph of its opinion [R. 1188], the appellate court correctly says: "In brief it may be said that the claimed invention relates to the problem of providing a simple and easy method of setting the *buttons*

or *keys* of an automatic tuner so as to bring in, upon pushing *any button* or *key,* the desired broadcasting station selected from a broad band of frequencies." (Emphasis added.) But near the end of its opinion, the court forgets its recognition of the broad purpose of the invention and illogically has the invention relate only to the provision of a simple and easy method of setting *lever*-operated tuners so that the desired station will be brought in upon pushing any *lever.* Thus the court asserts [R. 1209-1210] that the fourth requirement of its test of invention has not been met by petitioner's patented combination, because—

> "* * * the evidence fails to show that it superseded any prior devices or met with any commercial success. No *lever* operated tuner with appellant's tappet rocker system, either with or without the additional provision for television tuning, was ever built commercially. The only tuners manufactured under license from appellant were *leverless* push-button tuners of the type held not to be covered by the patent in suit in Leishman v. Commercial (*sic*) Electric Co., *supra.*"

Claims 7 and 8 call only for the tappet and rocker combination discussed throughout the court's opinion and in this petition and brief, and no lever or other operating member is called for. Respondent's chief radio engineer Schwarz admitted that this combination had been used in about one million Buick, Pontiac and Chevrolet cars [R. 415] before the date of the trial, as well as in an additional large number of Oldsmobiles and Cadillacs. [R. 415.] The U. S. District Court for the Western District of Oklahoma held that this combination had been

used in approximately eight million tuners during a period preceding General Motors' use. [Finding 25, p. 32, of The Richards and Conover record, filed by respondent with the present record.]

The appellate court's insistence upon dragging a lever *per se* into petitioner's combination, despite the fact that none of the claims call for a lever, is based upon its opinions in *Leishman v. Associated Wholesale Electric Company, supra,* and *Leishman v. Radio Condenser Company and General Instrument Corporation, supra,* in both of which the appellate court decided the issue of infringement without formally ruling upon the issue of invention. In both cases the accused devices were patentwise the same as those manufactured by respondent, and in both instances the court held there was no infringement because the accused tuners were operated by plungers rather than by levers. The court said the reissue claims in issue were not for the same invention as the original patent unless they included levers. Irrespective of the broadly worded objects in the original patent, the presence therein of claim 5 was alone enough to refute this thesis, for this claim contained no operating member of any kind. But the court refused to take this claim into consideration because it had later been disclaimed. It was not disclaimed, however, until some months *after* the reissue had been granted on an *identical* specification with *six claims that did not include* levers, and it was then disclaimed only because it was discovered to be so broad that it could be read upon Marschalk. [R. 290.] None of the other leverless claims were disturbed by this disclaimer. After the court thus read a lever into each of the claims, it said that plungers were not equivalents of levers.

The district courts in the Ninth Circuit were thereafter of course not at liberty to disturb this ruling, but all the courts not specifically controlled by it have emphatically expressed a different view.

In the earlier decision of the district court for the Southern District of California in *Leishman v. Associated Wholesale Electric Company,* 36 F. Supp. 804, 806, the court specifically stated with respect to the *plunger*-operated Crosley tuner:

> ". . . it cannot be seriously denied that the accused device uses a rotatable rocker, adjustable tappet and when brought to rest the two parts are coaxial—*the essential elements contained in the plaintiff's* [*Leishman's*] *structure.*" (Emphasis added.)

A few paragraphs later in the decision, Judge Harrison reiterated:

> ". . . as I have stated before, it contained plaintiff's combination, . . ."

In the case of *Leishman v. The Richards and Conover Company,* which was tried in the U. S. District Court for the Western District of Oklahoma, Civil Action No. 2155, the tuners were patentwise identical to those accused in the Ninth Circuit *Associated* case, *supra,* and those fighting the patent accordingly cited the decision of the Court of Appeals for the Ninth Circuit which held that plunger operated tuners were outside the scope of the claims. The U. S. District Court for the Western District of Oklahoma nevertheless stated that "to me this is a very clear case of the validity of a patent and in-

fringement." [P. 224, Richards and Conover record.] And his findings included the following [p. 29-30 thereof]:

> "11. The tappet or positioning element described in plaintiff's reissue patent No. 20,827 may be mounted either on a lever or a plunger to move the tappet, since a lever and a plunger perform their functions in the same way and are mechanical equivalents.
>
> "12. The finding 11 is based not only upon the evidence offered on behalf of plaintiff, but also upon the direct testimony of defendant's expert, Dr. Spotts, who testified to the effect that the substitution of plungers for levers is a simple one in the combination covered by claims 7, 8, 9, 10 and 11 of the said reissue patent.
>
> * * * * * * * *
>
> "16. The use of plungers for operating mechanical automatic tuners was known long prior to plaintiff's development of his patented structure set forth in the reissue patent in suit."

By the time *The Richards and Conover* case, *supra,* reached the Court of Appeals for the Tenth Circuit, the Court of Appeals for the Ninth Circuit had rendered its decision in *Leishman v. Radio Condenser Company, et al., supra,* in which it reaffirmed its decision in the *Associated* case and thus freed the plunger operated tuners of Radio Condenser Company and General Instrument Corporation, which said tuners were the same ones involved in *The Richards and Conover* case. The two decisions of the Court of Appeals for the Ninth Circuit were accordingly cited in behalf of The Richards and Conover Company, but the Court of Appeals for the Tenth Circuit, after

mentioning these two Ninth Circuit decisions, nevertheless said (172 F. 2d 365, 368, 369):

> ". . . claims 7 to 11, inclusive, embrace a single rocker and corresponding adjustable tappets mounted on pivots, *means for moving each tappet* so one of its sides engages one arm of the rocker and rotates the rocker until the other side of the tappet engages the other arm of the rocker, and *they do not specifically embrace a lever means for carrying and moving the tappets; and we are unwilling to rest our decision on the narrow ground that the lever in the device of the patent in suit and the plunger in the accused device are not mechanical equivalents.*[3]" (Emphasis added.)

Footnote No. 3 of the said decision then referred to a previous Tenth Circuit opinion in which it had specifically held that a member moving in a straight line like a plunger "responds to the claims in suit equally with one where" the corresponding member moved "on a hinged joint" like a lever. Footnote No. 3 also referred to paragraph in Walker on Patents, Deller's Edition, Volume 3, page 1706, Section 468, that elucidates the pertinent doctrine.

The Court of Appeals for the Ninth Circuit is thus alone in its view that a lever is a part of petitioner's combination; but this theory, which in its earlier decisions applied only to the issue of infringement, has been expanded in the instant case into a reason why the combination does not meet the test of invention which the

court applied in its *Six Wheel* decision. Were it not for the court's peculiar insistence upon reading a lever into the claims, despite the fact that none of the claims call for a lever and two of the claims omit the operating member altogether, the application of the test used in the *Six Wheel* case would have necessitated a holding that invention was involved in the claims at issue.[16]

---

[16]When the claims are literally read, this test, as set forth in the *Six Wheel* decision, 177 F. 2d 153, 162, would be applied as follows:

> "'Courts,' said Judge Learned Hand, 'made up of laymen as they must be, are likely either to underrate, or to overrate, the difficulties in making new and profitable discoveries in fields with which they cannot be familiar; and, so far as it is available, they had best appraise the originality involved by the circumstances which preceded, attended and succeeded the appearance of the invention. Among these will figure the length of time the art, though needing the invention, went without it.'" [the record shows that the search for a satisfactory tuner began in 1924, but if we consider only the filing date of the Schaefer patent mentioned by the court, it is clear that the art went without the present invention from 1928 until 1938 when petitioner's original patent issued] "'the number of those who sought to meet the need and the period over which their efforts were spread:'" [if we confine this to those trying to produce a simpler adjustable tappet tuner than Schaefer had done, the present record discloses the names of Marschalk, Soffieti, Lane and Mackey and the General Motors engineers Funk, Stelzl, DeRoo, Shuttleworth and Schwarz] "' how many, if any, came upon it at about the same time, whether before or after:'" [there is no evidence that anyone else came upon appellant's solution at about the same time, either before or after] "'and, perhaps most important of all—the extent to which it superseded what had gone before.'" [Were it not for the appellate court's impression, with which all the other courts disagree, that a lever was somehow a part of petitioner's combination, there could have been no denying that his combination largely superseded everything else that had gone before, and the test would thus have compelled a ruling that his contribution involved invention.]

Conclusion.

Any one of the five reasons relied upon for the allowance of the writ should be sufficient, and it is therefore respectfully urged that the petition be granted.

Respectfully submitted,

LeRoy J. Leishman,
In Propria Persona,

John Flam,
Counsel.

Dec. 12, 1944. G. M. LANE ET AL 2,365,088

STATION SELECTOR

Filed Nov. 29, 1937 2 Sheets-Sheet 1

FIG.5

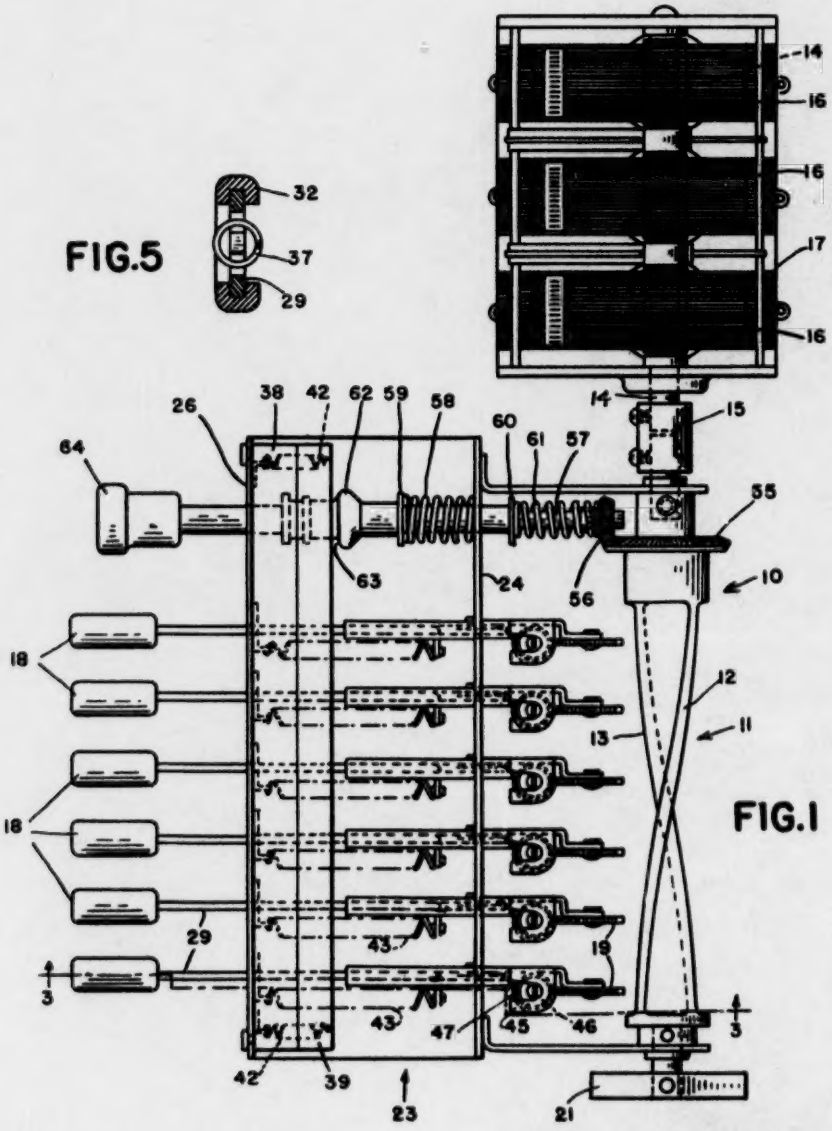

FIG.1

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STATION SELECTOR

Filed Nov. 29, 1937 2 Sheets-Sheet 2

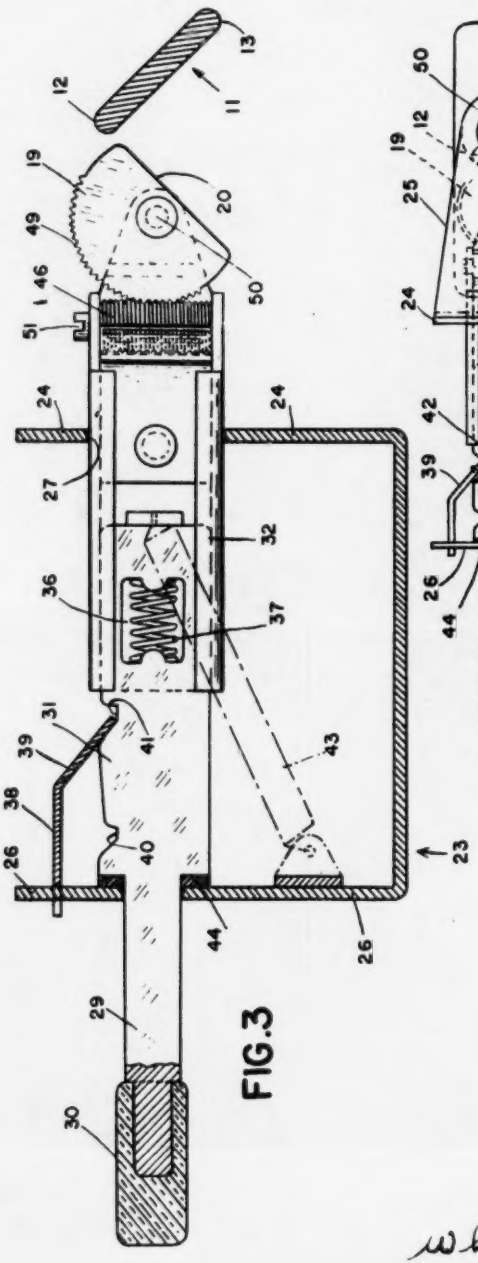

FIG.3

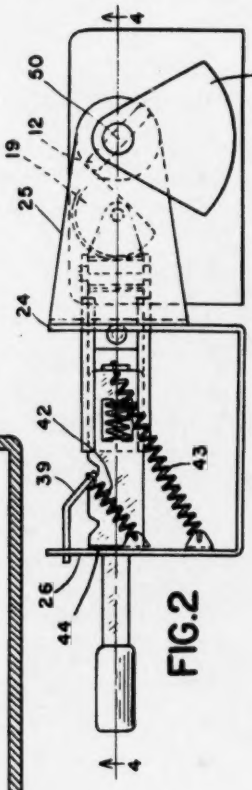

FIG.2

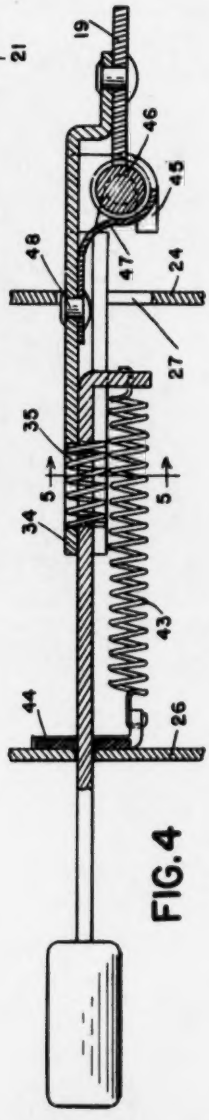

FIG.4

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2,365,088

STATION SELECTOR

Guy M. Lane and Henry W. Mackey, Detroit, Mich., assignors to The Crosley Corporation, Cincinnati, Ohio, a corporation of Ohio

Application November 29, 1937, Serial No. 177,163

12 Claims. (Cl. 74—10)

This invention relates generally to radio receiving apparatus and refers more particularly to station selectors of the type embodying a plurality of controls for independently adjusting the variable condensers in the tuning circuit of the radio receiving apparatus.

The principal object of this invention resides in the provision of mechanical means operatively connecting each of the controls to the condensers and effective upon selectively manipulating the controls to tune the radio circuit to the predetermined wave length.

Another advantageous feature of this invention resides in the provision of a station selector wherein the controls are in the form of independently operable push buttons respectively mechanically connected to the variable condensers in such a manner that movement of any one of the buttons to its extreme position of adjustment operates the condensers as a unit to tune the radio circuit to a particular wave length. In accordance with this invention, the push buttons correspond to the wave lengths assigned to different stations and the radio circuit may be tuned to selectively receive these stations by merely pressing the push buttons to their extreme operative positions.

A further object of this invention consists in the provision of a station selector having means in association therewith for actuating the condensers to tune the radio circuit independently of the push buttons.

In addition to the foregoing, the present invention contemplates a station selector which is relatively simple in construction and which is capable of accurately tuning the radio circuit to any one of a plurality of wave lengths with the minimum amount of attention and skill on the part of the operator. This feature, as well as the foregoing and other objects, will be made more apparent as this description proceeds, especially when considered in connection with the accompanying drawings, wherein—

Figure 1 is an elevational view of a station selector constructed in accordance with the present invention and operatively connected to a series of variable condensers;

Figure 2 is a side elevational view of the construction shown in Figure 1;

Figure 3 is an enlarged sectional view taken substantially on the plane indicated by the line 3—3 of Figure 1;

Figure 4 is an enlarged sectional view taken substantially on the plane indicated by the line 4—4 of Figure 2; and

Figure 5 is a cross sectional view taken substantially on the plane indicated by the line 5—5 of Figure 4.

In general, the station selector comprises a revoluble shaft 10 having a 90° spiral 11 extending axially of the shaft and having the opposite edges forming opposed cam surfaces 12 and 13. One end of the shaft 10 is operatively connected to a shaft 14 by means of a coupling 15, and the shaft 14 is shown in Figure 1 as being common to the rotors 16 of a plurality of variable condensers adapted to be electrically connected in the usual way in a tuning circuit of a radio receiver to vary the capacitance of this circuit. In actual practice, the plates of each of the rotors 16 are secured to the shaft 14 in spaced relationship axially of the shaft, and these plates are moved relative to the stator plates 17 to vary the capacities of the condensers by the shaft 10.

Supported for movement toward and away from the spiral portion 11 of the shaft 10 in a plane including the axis of rotation of the latter shaft is a plurality of push button units 18. As will be more fully hereinafter set forth, the push button units are mounted for movement independently of each other toward the shaft 10, and each unit has a cam member 19 secured to the end thereof adjacent the shaft 10 for movement therewith. Each cam member 19 is provided with a cam surface 20 which extends transversely or tangentially of the spiral portion 11 of the shaft 10 and is adapted to alternatively frictionally engage the cam surfaces 12 and 13. Upon reference to Figure 3, it will be noted that the cam members 19 are in the form of semi-circular discs and are mounted on their respective push button units for adjustment independently of each other about an axis parallel to the axis of rotation of the shaft 10 to vary the angle of inclination of the cam surfaces 20 relative to the spiral portion 11 of the shaft 10.

The shaft 10 is normally maintained in the position thereof shown in Figure 2 relative to the cam members 19 on the push buttons by means of the weight 21 secured to the shaft and having sufficient mass to automatically return the shaft to a position wherein the condensers are in their zero positions. When the shaft 10 is in its inoperative position defined above, the push buttons 18 are, of course, in their retracted positions and the cam surfaces 20 on the cam members 19 are located with their forwardmost edges adjacent the cam surface 12 on the spiral portion 11 of the shaft. The angle of inclination of each

of the cam surfaces 20 with respect to the spiral portion 11 of the shaft 10 is accurately adjusted so that movement of any one of the push button units 18 toward the shaft 10 effects a rotation of the shaft throughout the number of degrees required to tune the radio receiving circuit to the wave length assigned to the particular push button operated. In other words, selective operation of the push buttons varies the capacity of the condensers through the shaft 10 to tune the radio receiving circuit to different predetermined wave lengths. As will be presently described, provision is made herein for latching each push button unit in its operative position wherein the surface 20 of the cam carried thereby is engaged with the spiral portion 11 of the shaft 10, and the latch for accomplishing this result is automatically released upon manipulation of any one of the other push button units. When, however, all of the push buttons are released, the weight 31 functions to rotate the shaft and associated rotors of the variable condensers to their zero positions.

It follows from the foregoing that each push button unit corresponds to a particular wave length and that the different number of wave lengths capable of being tuned depends upon the number of push buttons employed. Although six push button units are shown in the present illustrative embodiment of the invention, it will, of course, be understood that this number may be varied without departing from the spirit or scope of this invention.

Referring now more in detail to the particular construction of the station selector forming the subject matter of this invention, it will be noted that the push button units 18 are carried by a bracket 23 extending for substantially the full length of the shaft 10 and being channel-shaped in cross section. Upon reference to Figure 2, it will be noted that the inner flange 24 of the bracket is positioned adjacent the shaft 10 and that the latter is rotatably mounted at opposite ends thereof in strips 25 secured to the flange 24. The outer flange 26 of the bracket and the inner flange 24 is formed with a plurality of aligned slots 27 therethrough spaced from each other in the direction of the axis of the shaft 10 and slidably receiving the push button units to support the same for movement in directions toward and away from the shaft 10. It follows from the above that the push button units 18 and the condenser operating shaft 10 form an assembly capable of being installed as a unit in association with the radio receiving apparatus.

Each of the push button units 18 comprises a plunger 29 having a finger engaging button 30 at the outer end thereof and having an enlargement 31 located at the inner side of the flange 26. The inner end portion of the enlargement 31 telescopically engages in an extension 32 and the latter, in turn, extends through the adjacent slot 27 in the flange 24 of the bracket. The extension 32 has the cross sectional contour illustrated in Figure 5 and the side wall 34 is formed with a slot 35 therethrough in registration with an opening 36 formed in the inner end portion of the enlargement 31. A coil spring 37 is secured in the opening 36 under compression and is adapted to extend through the slot 35 to provide a yielding connection between the plunger 29 and extension 32. The arrangement is such that movement of the plunger 29 inwardly toward the shaft 10 effects a corresponding movement of the extension 32 through the medium of the spring 37. It will be understood as this description proceeds that the spring 37 cooperates with the latch holding the push button unit in its operative position to maintain the cam surface 20 on the cam 19 in frictional contact with the co-operating cam surface on the spiral portion 11 of the shaft 10.

The means for latching each of the push button units in a position wherein the cam surface 20 is in operative relation with the spiral portion 11 of the shaft 10 comprises a longitudinally extending plate 38 having the opposite end portions pivoted to the ends of the flange 26 laterally beyond the push button units and having the inner end 39 bent inwardly to successively engage in the notches 40 and 41. Suitable springs 42 are provided for the purpose of maintaining the inner edge portion 39 of the plate 38 into frictional engagement with each of the plungers 29 of the push button units. Upon reference to Figure 3, it will be noted that the inner edge 39 of the plate engages within the innermost notch 41 when the push button units are in their inoperative positions so that movement of the plungers 29 of these units to their innermost positions cams the plate 38 out of engagement with the notch 41 and causes the edge 39 of the plate to snap into engagement with the outermost notch 40 to hold the plungers against return movement under the action of the springs 43. In this connection, it will be noted that the inner ends of the springs 43 are respectively connected to the corresponding ends of the plungers 29 and the outer ends of the springs are anchored to the flange 26 of the bracket. The arrangement is such that the push button units are held in their operative positions by the plate 38 until the latter is moved out of engagement with the notches 40 against the action of the springs 42, whereupon the springs 43 operate to return the push button units to their inoperative position shown in Figure 3. If desired, suitable fabric or rubber washers 44 may be inserted between the inner end of the enlargement and the inner side of the flange 26 so as to avoid any noise that may result from engagement of the enlargement with the flange 26.

It will, of course, be understood from the above that the notches 41 in the enlargements 31 of the plungers are so arranged that they do not interfere with the return movement of the push button units to the position thereof shown in Figure 3. The purpose of the notches 41 is merely to cam the latch plate 38 out of engagement with one of the push button units upon manipulation of another of said units. In other words, only one of the push button units is operated at a time to tune the radio receiving circuit to the desired wave length, and this unit is automatically released upon manipulation of another unit to secure a different wave length.

Reference has been made above to the fact that the spring 37 associated with each push button unit serves the purpose of maintaining the associated cam surface 20 in frictional engagement with the spiral portion 11 of the shaft 10. In this connection, it will be noted that manipulation of any one of the push button units to effect an adjustment of the condensers by rotating the shaft 10 applies a counteracting force against the associated cam surface 20 in a direction away from the shaft 10. This force is absorbed by the spring 37 and, as a consequence, the latter functions to yieldably maintain the cam surface 20 in contact with the adjacent portion of the spiral.

The cam discs 19 are respectively adjustably

mounted upon their respective push button units to vary the angle of inclination of the cam surfaces 20 with respect to the spiral portion 11 of the shaft and thereby control the extent of rotative movement of the shaft by the respective cam members when they are moved by the push button units in directions toward the shaft. In detail, the inner end of each of the extensions 32 is return bent, as at 45, to receive a worm 46 maintained in the return bent portion 45 by means of a retainer plate 47 secured to the extension, as at 48. The worm 46 on each push button unit meshes with teeth 49 formed on the peripheral edge of the semi-circular cam member 19 carried by the same unit at the inner side of the worm. As stated above, the cam member 19 is pivotally supported on the extension 32 for rocking movement about an axis 50 located in a common plane with the axis of the shaft 10 and extending parallel to the latter axis. One end of each of the worms 46 is slotted, as at 51, to receive a suitable tool and by means of this tool, the worms may be rotated to effect an angular adjustment of the cam surfaces 20 with respect to the spiral portion 11 of the shaft 10.

Assuming that the condenser is in its zero position wherein the plates of the rotors are completely housed between the cooperating plates of the stators and that it is desired to vary the capacity of the condensers, it will be noted that the operator merely presses the push button unit corresponding to the particular wave length of the station he desires to receive. Movement of this selected push button unit in a direction toward the shaft 10 engages the cam surface 20 of this unit with the cam surface 12 of the spiral portion 11 of the shaft 10 and effects a rotation of this shaft throughout a number of degrees depending upon the angular adjustment of the cam surface 20 with respect to the cam surface 12 on the spiral. Inasmuch as the shaft 10 is directly coupled to the condenser shaft 14, it follows that the rotors of the condensers are moved throughout a corresponding degree of angular travel from the zero position thereof to decrease the capacity of the condensers. Assuming that the operator now desires to secure a station which requires an increase in capacity of the condensers, it will be noted that movement of the selected push button unit toward the shaft 10 engages the cam surface 20 of this unit with the cam surface 13 of the spiral to rotate the shaft 10 and condenser shaft 14 in the opposite direction. As stated above, initial manipulation of the second push button unit releases the latch plate 38 from the first mentioned push button unit and permits the latter to return to its inoperative position under the action of the spring 43. In this connection, attention is called to the fact that the cam surface 20 acts upon the cam surface 12 of the spiral portion 11 whenever the adjustment of the variable condensers requires a decrease in capacity and acts upon the opposite cam surface 13 when it is desired to increase the capacity of the condensers.

Provision is made herein for actuating the variable condensers independently of the push button units to vary the capacities of these condensers. As shown in Figure 1, a beveled gear 55 is secured to the shaft 10 and meshes with a beveled pinion 56 secured to the inner end of a shaft 57 slidably mounted in the flanges 24 and 26 of the bracket 23. In the outermost position of the shaft 57, the pinion is free from the gear 55 and is held in this position during tuning of the variable condensers by the push button units so that the latter need not overcome the resistance offered by the auxiliary tuning unit when adjusting the shaft 10. The shaft 57 is normally maintained in its inoperative position by means of a spring 58 surrounding the shaft with one end engaging the outer side of the flange 24 and the other end engaging a washer 59 secured to the shaft 57. Movement of the shaft to its inoperative position by the spring 58 is limited by means of a second washer 60 held against a shoulder on the shaft by a spring 61 and engageable with the inner surface of the flange 24. The shaft 57 is held in its innermost position wherein the pinion 56 meshes with the gear 55 by means of an enlargement 62 on the shaft having a shoulder 63 adapted to be engaged by the latch plate 38 previously described as also functioning to hold the push button units in their operative positions. A suitable control knob 64 is secured to the extreme outer end of the shaft in a position where it may be conveniently manipulated by the operator.

With the above construction, it will be noted that manipulation of any one of the switch button units will have the effect of automatically releasing the auxiliary control for the condensers since the pinion 56 is held into mesh with the gear 55 by the latch plate 38 which is, of course, released from the enlargement 62 when any one of the push button units is actuated.

What we claim as our invention is:

1. In a station selector for radio receiving apparatus, the combination with a variable condenser having a rotor shaft, of a positionable member coupled to the rotor shaft and having a cam surface extending in the direction of the axis thereof, a plurality of control members supported for movement independently of each other toward the positionable member, a cam member carried by the end of each control member adjacent the positionable member and each of said cam members having a cam surface engageable with the cam surface on the positionable member upon selectively moving the control members toward the positionable member to rotate the latter and rotor shaft throughout different predetermined degrees of angular travel, means for yieldably resisting movement of the control members toward the positionable member, and latch means for maintaining the cam of each control in engagement with the cam surface on the positionable member against the action of the yieldable means and releasable upon movement of any one of the other control members in a direction toward the positionable member.

2. In a station selector for radio receiving apparatus, the combination with a variable condenser having stator blades and rotor blades movable relative to the stator blades, of a rotor shaft operatively connected to the rotor blades and having a spiral portion extending in the general direction of the axis of the shaft providing opposed cam surfaces, a plurality of controls supported for movement independently of each other toward said surfaces, and a cam member mounted on the end of each control adjacent said spiral portion and each cam member having a cam surface alternatively engageable with the cam surfaces of the spiral upon selectively moving the control members in a direction toward said spiral portion to rotate the latter in opposite directions throughout different predetermined degrees of angular travel.

3. In a station selector for radio receiving ap-

paratus, the combination with a variable condenser having stator and rotor blades movable relative to the stator blades, of a rotor shaft operatively connected to the rotor blades and having a connecting member having opposed cam surfaces extending in the general direction of the axis of the rotor shaft, a plurality of control members supported for movement independently of each other in a direction radially of the axis of the connecting member, a cam member mounted on the end of each control member adjacent said connecting member and each cam member having a cam surface extending toward the cam surfaces on said connecting member and alternatively engageable with the cam surfaces thereof upon selectively moving the control members in a direction toward said connecting member to rotate the latter in opposite directions throughout different predetermined degrees of angular travel, and means effective upon movement of any one of the control members toward said connecting member to yieldably maintain the cam surface of the associated cam member in frictional engagement with the adjacent cam surface on said connecting member.

4. In a station selector for a radio receiving apparatus, the combination with a variable condenser having stator blades and cooperating rotor blades movable relative to the stator blades, of a rotor shaft operatively connected to the rotor blades to move the latter relative to the stator blades and having a cam surface extending in the general direction of the axis of said shaft, a plurality of control members supported for movement independently of each other transversely of the shaft, means carried by the control members and effective upon selectively moving the members toward said shaft to engage the cam surface on said shaft and rotate the latter throughout different predetermined degrees of angular travel, said means comprising a cam segment pivotally mounted on the end of each control for swinging movement on an axis parallel to the axis of the shaft and having a straight edge portion disconnectedly engageable with the cam surface on the shaft, and an adjustable screw mounted on each control and engageable with teeth formed on the arcuate surface of the cam segment to vary the angular relationship between the straight edge portion of the cam and the cam surface on the shaft.

5. In an automatic tuning device, in combination with mechanism to be tuned, a positionable member connected to said mechanism for rotating the same, and mounted for rotation about an axis, a plunger member movable longitudinally in a direction transverse to said axis, a positioning member pivoted on said plunger for contacting and moving said positionable member, and means for locking said positioning member in a selected angular relationship on said plunger.

6. In a radio station selector, in combination with a tuning device, a frame, a manual for moving the tuning device to a predetermined position, said manual being slidably mounted in said frame, an actuating member at the inner end of said manual, the said actuating member being rotatably mounted on said manual for adjustment, the said member having two actuating parts spaced on opposite sides of the rotational axis thereof, and an adjusting screw carried by said manual for adjusting the said actuating member about its said axis.

7. In automatic tuning apparatus a mechanism to be tuned, a member movable on an axis to tune said mechanism, a plunger movable longitudinally transversely to and in a direction through said axis, and means on said plunger for positioning said member by first moving said member in one direction about its axis and then stopping said member in a predetermined position by contact therewith on the other side of the axis of said member, said means on said plunger being adjustable with relation thereto for varying the position to which said plunger moves said member.

8. In an automatic tuning device, a casing, a member pivoted to turn about an axis in said casing, a series of plungers slidably mounted in said casing for longitudinal movement in a direction transverse to and thru said axis, and adjustable means on said plungers for swinging said member to predetermined angular positions.

9. In a radio station selector, in combination with a tuning device, a frame, a manual for moving the tuning device to a predetermined position, said manual being slidably mounted in said frame, an actuating member at the inner end of said manual, said actuating member being rotatably mounted on said manual for adjustment, the said member having two actuating parts spaced on opposite sides of the rotational axis thereof and means carried by said manual for adjusting the said actuating member about its axis.

10. In an automatic tuning device, in combination with a mechanism to be tuned, a member pivoted to turn about an axis, a connection between said member and said mechanism, a plunger longitudinally movable transversely to said axis, and means on said plunger for swinging said member to a determined angular position when said means is brought against said member, said means being adjustable with respect to said plunger.

11. In an automatic tuning device, in combination with a mechanism to be tuned, an elongated member pivoted to turn about its longitudinal axis, a connection between said member and said mechanism, a plurality of plungers each longitudinally movable toward said axis and means on each of said plungers for swinging said member to a determined angular position when said means is brought against said member.

12. In an automatic tuning device, in combination with a mechanism to be tuned, an elongated member pivoted to turn about its longitudinal axis, a connection between said member and said mechanism, a plurality of plungers each longitudinally movable toward said axis and means on each of said plungers for swinging said member to a determined angular position when said means is brought against said member, each of said plungers having resilient means for urging it out of contact with said elongated member.

GUY M. LANE.
HENRY W. MACKEY.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1951
No. 514

LEROY J. LEISHMAN,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

October Term, 1951
No. 514

LEROY J. LEISHMAN,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

Rule 38(5b) of the Rules of this Court is relied upon to support the petition in the instant case, but it is submitted that no reason or ground for the grant of certiorari such as is required by the rule is presented. There is no conflict of decision between Courts of Appeals, and the case merely involves a factual determination by both courts below that invention is not present in United States Letters Patent No. Re. 20,827.

The decision which petitioner desires reviewed is reported as *Leishman v. General Motors Corp.* (1951, 9 Cir.), 191 F. 2d 522, which in holding petitioner's patent invalid for want of invention affirms *General Motors Corporation v. Leishman* (1949, D. C. S. D. Cal.), 85 Fed. Supp. 187. These concurrent decisions

are in square accord with *Richards and Conover Co. v. Leishman* (1949, 10 Cir.), 172 F. 2d 365, which likewise held petitioner's patent lacking in invention. In urging that the decision of the Court of Appeals for the Ninth Circuit holding petitioner's patent invalid for want of invention is based upon different reasoning than is the decision of the Court of Appeals for the Tenth Circuit, petitioner misconceives the purport of Rule 38(5b) and confuses actual conflict between decisions with mere difference of reasoning in arriving at identical decisions. No Court of Appeals has ever held the instant patent valid, and in the absence of conflict between decisions the petition in the instant case should be denied. (*Layne & Bowler Corp. v. Western Well Works,* 261 U. S. 387, 43 S. Ct. 422; *Keller v. Adams-Campbell Co.,* 264 U. S. 314, 44 S. Ct. 356.)

In addition to the two decisions of the Courts of Appeals of the Ninth and Tenth Circuits, the instant patent has been considered by the Court of Appeals for the Ninth Circuit on two other occasions. In *Leishman v. Associated Wholesale Electric Co.* (1943, 9 Cir.), 137 F. 2d 722, and in *Leishman v. Radio Condenser Co. et al.* (1948, 9 Cir.), 167 F. 2d 890, the patent was held not infringed by tuners patent-wise the same as the tuners here in suit. Petitioner attempts to develop a conflict between Circuits by asserting that the Court of Appeals for the Tenth Circuit in its decision in *The Richards and Conover* case holding petitioner's patent invalid disagreed with the Court of Appeals for the Ninth Circuit in its decisions in the *Associated Wholesale* and the *Radio Condenser* cases holding the patent not infringed. Were this the fact it would be immaterial here since the two Circuits agree that the patent is invalid. The Court of

Appeals for the Tenth Circuit in *The Richards and Conover* case did not, however, hold the patent infringed, merely saying at 172 F. 2d page 369:

> "* * * we are unwilling to rest our decision on the narrow ground that the lever in the device of the patent in suit and the plunger in the accused device are not mechanical equivalents."

Additionally, in urging as erroneous those decisions holding his patent not infringed, petitioner states that thereby tuners manufactured by alleged infringers became unavailable for the purpose of showing the commercial success enjoyed by petitioner's patent. This court has had ample opportunity to review those decisions, having denied petitions for certiorari directed to this point no less than three times. In *Leishman v. Associated Wholesale Electric Co.,* 320 U. S. 794, 64 S. Ct. 262, this court denied a petition for certiorari to review *Leishman v. Associated Wholesale Electric Co.,* 137 F. 2d 722. In *Leishman v. Radio Condenser Co. et al.,* 335 U. S. 891, 69 S. Ct. 246, this court denied a petition for certiorari to review *Leishman v. Radio Condenser Co. et al.,* 167 F. 2d 890. In *Leishman v. Radio Condenser Co. et al.,* 336 U. S. 921, 69 S. Ct. 639, this court denied a petition for rehearing of the previous denial of certiorari in *Leishman v. Radio Condenser Co. et al., supra.* Moreover, as recognized by the court below, such commercial success is only pertinent where the question of invention is in doubt. (*Dow Chemical Co. v. Halliburton Oil Well Cementing Co.,* 324 U. S. 320, 65 S. Ct. 647.) Finally, it is well-established that commercial success is not established by proof of sales of independently developed competitive devices. (*Cuno Engineering Corp. v.*

Automatic Devices Corp., 314 U. S. 84, 62 S. Ct. 37; *Schreyer v. Chicago Motocoil Corp.* (1941, 7 Cir.), 118 F. 2d 852; *Johnson v. Lambert* (1916, 2 Cir.), 234 Fed. 886; *Haggerty v. Rawlings Mfg. Co.* (1926, 8 Cir.), 14 F. 2d 928.) The District Court below found as a fact that:

> "11. The widespread acceptance of push-button tuners in the radio industry is not attributable to the disclosures of the patent in suit * * * 12. Such widespread acceptance of push-button tuners in the radio industry is probably due to independent research and experimentation in the engineering department of the Crosley Corporation, an Ohio corporation which, prior to plaintiff, manufactured push-button turners in the radio industry." (Opinion below, 191 F. 2d 522, footnote at page 532.)

On its merits this petition merely quarrels with factual determinations made below and by the Court of Appeals for the Tenth Circuit to the effect that no structure of inventive merit is disclosed by petitioner's patent. This court, in addition to its opportunities for review cited above, twice has denied petitioner's attempt to obtain a review of the decision of the Court of Appeals for the Tenth Circuit holding the patent non-inventive. In *Leishman v. The Richards and Conover Company,* 336 U. S. 952, 69 S. Ct. 882, this court denied a petition for certiorari to review *Richards and Conover Company v. Leishman* (1949, 10 Cir.), 172 F. 2d 365. In *Leishman v. The Richards and Conover Company,* 337 U. S. 927,

69 S. Ct. 1167, this court denied a petition for rehearing of its previous denial of certiorari in *Leishman v. The Richards and Conover Company, supra.* The decisions below are concurrent and only in the most extraordinary case will such decisions be disturbed. (*Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.,* 321 U. S. 275, 64 S. Ct. 593; *Williams Mfg. Co. v. United Shoe Machinery Corp.,* 316 U S. 364, 62 S. Ct. 1179; *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U. S. 271, 69 S. Ct. 535.)

Respectfully submitted,

LEONARD S. LYON,
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Office - Supreme Court, FILED FEB 1 1952 CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1952.

No. 514.

LEROY J. LEISHMAN,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

LEROY J. LEISHMAN, *Petitioner,* vs. GENERAL MOTORS CORPORATION, *Respondent.*	No. 514.

PETITIONER'S REPLY BRIEF.

The situation which respondent urges as the chief basis for its contentions that certiorari should be denied, is the very situation that petitioner set forth in explaining his fourth reason why the writ should be granted. It was fully disclosed in the petition, the appendix and the brief that both appellate courts had held the patent invalid, but that both courts had done so upon different erroneous grounds and by unorthodox methods in conflict with those used and recommended by this Honorable Court in its applicable decisions. Respondent does not deny any of this, and no issue is taken with petitioner's well documented statements regarding the serious errors that misled the courts. Respondent's thesis is merely that the dual conclusions of invalidity leave no basis for certiorari. But when these conclusions are based upon different and equally untenable grounds that cannot be denied by respondent, the two opinions create a far more cogent reason for granting certiorari than a mere conflict could possibly do. Two wrongs do not make a right, but multiply injustice.

In a far less serious situation, this Honorable Court said:

> "It is urged, however, that concurrence of two courts below, in holding the patent claims valid, concludes this Court. A recent restatement of the 'two-court rule' reads, 'A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below *in the absence of a very obvious and exceptional showing of error.*'" (Emphasis added.) *The Great Atlantic and Pacific Tea Company* v. *Supermarket Equipment Corporation*, 340 U. S. 147, 153.

There has been in this case a most unusual showing of grave errors that are obvious when once pointed out, and it is significant that respondent does not deny any of them. Moreover, the findings of fact upon which the appellate courts respectively based their conclusions of law, are *not concurrent* and were made by the appellate courts themselves to rationalize or replace the findings made by the trial courts.

If one court of appeals holds a patent invalid upon untenable grounds, there may be reason to assume that the error will result in a future conflict between circuits and that consequently no injustice will follow if certiorari is denied in the first instance; but if two appellate courts hold the patent invalid upon untenable grounds, the cumulative error becomes intolerable and there is no way the injustice can be rectified excepting through the supervisory powers of this Honorable Court.

One of the chief things relied upon by the Court of Appeals for the Ninth Circuit in its holding of invalidity was certain carefully prepared direct testimony given by respondent's expert witness on direct examination. The appellate court said this testimony was reasonably credible, and that it could not therefore overrule the trial court.

But the petition stated (p. 12), and the supporting brief verified (p. 24 et seq.), that this testimony was controverted by the witness himself on cross-examination and that neither this witness nor his testimony was even mentioned in the lower court's opinion. Respondent's brief has of course entirely ignored petitioner's revelations of this serious error. When a litigant loses a case because of such a departure from proper practice upon the part of the appellate court itself, the litigant manifestly has no recourse excepting to this Honorable Supreme Court.

In stating in its decision in *The Great Atlantic and Pacific Tea Co.* v. *Supermarket Equipment Corporation*, 340 U. S. 147, 152, that the whole of a combination of old elements, in order to be patentable, must exceed the sum of its parts, this Honorable Court provided the lower courts with a yardstick for determining invention in combination patents that should go far toward removing the uncertainty that has filled the minds of many judges in the past, and petitioner's brief (pp. 19 to 23) showed that his combination would have fully met this test had it been applied.

This Honorable Court has made rather strong statements regarding another affirmative test for invention that is applicable in situations where skilled artisans have repeatedly failed to solve the problem effectively met by a combination in question. This rule, succinctly phrased in *Expanded Metal Co.* v. *Bradford*, 214 U. S. 366, 381, and cited in the petition on page 9, was clearly applicable to the instant patent, yet it was ignored by the courts of appeals for both the Ninth and Tenth circuits. Courts logically complain about the difficulty encountered by scientific laymen when required to determine, in retrospect, whether invention is present in a given combination, yet these two tests, both approved by this Honorable Court, are clearly within the ability of any of the lower courts to apply if the proper evidence is available, as it was in the instant case. One object of the Law is to establish uniformity in deci-

sions, but only chaos can result if the lower courts are permitted to set aside the Supreme Court's rules, as they have done here, and substitute as many different methods for determining invention as there are judges in the federal judiciary.

Most of the erroneous and needless engineering observations made and relied upon by the appellate courts in connection with the instant patent have been the direct result of their failure to follow the safe procedure approved by this Court in the aforementioned Bradford decision. Specific reference to some of these will show not only how the grant of certiorari in this case can remove thirteen years of injustice to the instant patentee, but how the whole tone of patent decisions can improve and future injustices be averted if this Honorable Court will avail itself of the present opportunity to insist upon the observance of its pertinent rules and adherence to proper judicial procedure.

It was stated in the petition (p. 12) and shown in the brief in support thereof (p. 31 et seq.) that the court of appeals in the instant case had made erroneous but controlling statements of fact that were controverted right in the opinion by testimony previously quoted with apparent approval. Either the court was very careless, or it did not understand what it was quoting. Had the court followed the test approved by this Honorable Supreme Court in the *Bradford* case, it could have avoided the needless consideration of ancillary engineering problems of unsuspectedly hidden complexity, and it could have stated with unassailable logic that since the Zenith Corporation and Marschalk and the Crosley Corporation and respondent General Motors Corporation had all failed to find a simple way to build an adjustable tappet tuner that would not "creep", that petitioner's completely satisfactory solution, which these corporations all adopted, was manifestly beyond mechanical skill.

Instead, the court went on unknowingly to compound its errors in the very next paragraph, thus (R. 1197):

> "• • • What appellant has done in effect (although there is no evidence of any conscious effort to that end), has been to tie together with cross-members the ends of the two lower arms or cross-bars of Schaefer, and to cut off the racks and pinions above the arms, and to insert rotatable shafts at the center of the new tie bars so that the arms or cross-bars on which the tappet operates will now rotate instead of move up and down. Here, as in the Schaefer device, creeping is avoided because of the attained equilibrium, the pressure on either side being continuously the same, and this is obtained, of course, through the coaxiality resulting from the modifications just described." (Parenthetical explanation by the court itself.)

The modifications described by the court do *not* result in coaxiality. If one were "to insert rotatable shafts at the center of the new tie bars", as the court says was done, the rocker thus formed would not be coaxial with the tappet and the tuner would "creep" just as Marschalk's did. Yet the court based its opinion upon the assumption that the described change would produce a coaxial structure. This needless and error-producing sojourn into an expert's proper field shows what can happen when a court ignores the aforementioned safe rules provided by this Honorable Court. If one were to add tie bars to Schaefer's cross-bars in order to produce a rocker to cooperate with his particular tappet, as described by the court, the axis of the rocker, if the device were to become coaxial, could not go through the center of the tie bars as the court wrongly assumes, but would have to lie on the top surface of the rocker in order to be coincident with the axis of Schaefer's tappet. The rocker and tappet must be especially shaped with respect

to each other with the idea of coaxiality definitely in mind, and coaxiality is not an inadvertent result.

In the Richards and Conover trial, the attorney and expert opposing the patent tried initially to convince the court that petitioner's structure would automatically result from a combination of Schaefer's tappet and Marschalk's rocker, but in order to arrive at an operative coaxial combination to demonstrate for the court, it was necessary to arrange the rocker's axis flush with the rocker's top surface. Many pages of testimony were devoted to Mr. Flam's and Judge Chandler's cross-examination of the witness regarding the obviousness or unobviousness of these additional steps required to achieve coaxiality in a combination such as the Court of Appeals for the Ninth Circuit has assumed would automatically embody this relationship without doing anything further. The witness who was opposing the patent in The Richards and Conover case was Dr. Spotts, Associate Professor of Machine Design at Northwestern University, and his concluding testimony as to whether he would expect his own students in machine design to arrive at coaxiality in such a structure was as follows (p. 38 of Richards and Conover record, filed herein by respondent):

> "A. I wouldn't expect many of them to try to lower the top surface of the plate to the center of the shaft merely from looking at the Marschalk drawings, and having no model to tell that.
>
> "Q. Then you would not expect them to arrive at this Model, Exhibit M?[1] A. Not to that degree, no."

---

[1]Exhibit M was a model in which the coaxial relationship had been embodied by lowering the top surface of the rocker to the center of the shaft which the Court of Appeals for the Ninth Circuit erroneously thought would automatically produce a coaxial structure if placed in the *center* of the rocker where one would normally expect to place it.

But the Court of Appeals for the Ninth Circuit, in the last foregoing quotation from its opinion, held that no invention was involved in petitioner's combination because the court failed to perceive that this combination would not automatically result from its hypothetical alterations in Schaefer's mechanism; and the Court was totally oblivious to the necessity for such additional changes as Dr. Spotts thought were beyond the ability of his own engineering students. The point here is that such an error could not have occurred had not the court unnecessarily ventured into fields of scientific observation and speculation that are unsafe for "judges undisciplined in the craft and untutored in its inarticulate presuppositions", as the Court of Appeals for the Second Circuit phrased it in the following portion of its opinion in *Landis Machine Company et al.* v. *Parker-Kalon Corporation, et al.*, 190 F. 2d 543, 546:

> "* * * it scarcely needs more than the statement of the question to disclose the fatuity of asking judges, undisciplined in the craft and untutored in its inarticulate presuppositions, to say how far the innovation is beyond the powers of merely competent craftsmen. For that reason we have over and over again resorted to the history of what went before, the duration of the period during which the invention was needed but failed to appear and its acceptance when it did. These circumstances have seemed to us, not indeed an absolute determinant of invention, for there is none; but at least the best, and indeed almost always the only, rational approach to a solution."

This test is practically the same as that recommended by this Honorable Supreme Court in the aforementioned *Bradford* case when it said (214 U. S. 366, at 381):

> "* * * It may be safely said that if those skilled in the mechanical arts are working in a given field

> and have failed after repeated efforts to discover a certain new and useful improvement, that he who first makes the discovery has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor."

No error of any kind would have occurred had the Court of Appeals for the Ninth Circuit applied this dependable Supreme Court formula to the evidence in the instant case. The record showed that the Zenith Corporation had long sought a simpler tuner than its own Schaefer device. The appellate court itself mentioned the complexities of this device and Marschalk's unsuccessful efforts to improve it. The record shows that the Crosley Corporation also recognized the shortcomings in the Zenith-Schaefer tuner and had difficulty with its own research until after it asked its patent attorney to investigate petitioner's teachings. (See footnote 5, page 12 of the brief supporting the petition.) And with perhaps even greater significance, the record shows that the engineers of respondent General Motors Corporation were successful in making only a minor simplification in the Schaefer tuner, and that respondent discarded the results of its own research, adopted petitioner's simple structure, and filed this Declaratory Judgment action asking the court to hold that petitioner's contribution involved only mechanical skill. (See pp. 19 to 23 of the brief supporting the petition.)

If the anomalous and impossible position of respondent was not readily apparent to the appellate court, it would have been revealed by following this Honorable Supreme Court's applicable decisions.

The decisions of invalidity made by the Court of Appeals for the Tenth Circuit in *Leishman* v. *The Richards and Conover Company,* 172 F. 2d 365, were also based

upon erroneous technical assumptions that would not have been made had it followed the rule which this Honorable Court described as a "safe" one in its Bradford decision, supra. After finding that its first decision, as shown in the Appendix to the instant petition (App. 5 to 7) and supporting brief (Br. 3 and 4), was based upon a misconception of the purpose of the coaxial relationship in petitioner's combination, the Court of Appeals for the Tenth Circuit ventured upon an independent mathematical analysis of the reasons for creeping. Not only did the court base its second opinion upon the belief that this analysis was a correct and proper one, but it impressed and misled the district court in the instant case which was withholding its opinion for that of the Court of Appeals for the Tenth Circuit (see p. 7 of the Appendix to the present petition). The final opinion of the latter court after rehearing was reported along with the first. The purported mathematical analysis was pseudo-scientific in the extreme, as shown by the affidavits of the respective leading authorities in mechanical engineering at California Institute of Technology, University of Southern California, and University of California at Los Angeles (R. 71 to 83), yet this unnecessary invasion into an expert's domain became the basis for two decisions against the patent.

We cannot have two different orders of scientific truth in the United States: one in the universities, and another artificial and incompatible one in the courts. But this state of affairs would not exist if the lower courts adhered to this Honorable Court's proper standards for determining invention.

We are thus faced with a situation, undenied by respondent, that raises a serious question of great importance to the patent system, to the federal courts, and to industry in general. This question was presented in the petition (pp. 8 and 9 thereof) as the fourth which this Honorable Court should decide in the present case, but it is

by no means fourth in importance. Industry has largely been built upon unobvious technical advances resulting from research and experimentation, and when this work is carried on by a small concern or private party there is no possible reimbursement excepting the brief monopoly provided by the patent laws. A patent is the inventor's short term deed to the fruits of his labors. If the courts that safeguard these rights are not held to proper standards for determining invention, large entrenched interests can appropriate the results of the creative work of individuals and small concerns, forcing them out of business and destroying in such cases the initiative that is the leaven of our free enterprise system.

Respondent's brief misconstrues some of petitioner's statements with respect to the issue of infringement. Nowhere did petitioner state that the Court of Appeals for the Tenth Circuit held the patent infringed. On page 43 of his brief petitioner quoted from the decision of that court in *Leishman* v. *The Richards and Conover Company,* 172 F. 2d 365, 368, 369, and reference was also made to footnote 3 of that decision which left no possible doubt that that court would have held the patent infringed had not it made the grave errors with respect to validity that were referred to in the brief in support of the petition herein, and also in the Petition for a Writ of Certiorari and Supporting Brief in *The Richards and Conover* case, October Term, 1948, No. 612, and particularly in the Petition for Rehearing of Order on Petition for Writ of Certiorari therein. The lower court in that case held the patent valid and infringed, and Judge Harrison, in the first case involving this patent, held that petitioner's combination was included in tuners patentwise the same as those of respondent. (See page 41 of the brief accompanying the petition herein.) There is no evidence that any other court shares the views of the Court of Appeals for the Ninth Circuit that such a structure would not infringe the claims here at issue.

Respondent makes much of the fact that this Honorable Supreme Court denied certiorari in these other cases. This Court has many times stated that denial of certiorari is not to be construed as an approval of the decision sought to be reviewed, and respondent should know this.

There is one important thing, however, with respect to the denial of certiorari in these other cases that should be of interest to this Honorable Court at this time. The case of *Leishman* v. *Radio Condenser Company and General Instrument Corporation* (see pp. 15 to 19 of the petition herein) is again before the district court on a timely motion to reopen the case on the basis of new evidence. The ultimate decision herein will be controlling with respect to the final decision in that case. That case superseded the Tenth Circuit *Richards and Conover* case with regard to the tuners manufactured by Radio Condenser Company and General Instrument Corporation. The granting of certiorari herein will thus serve all the purposes that would have been served had certiorari been granted in these other actions. This Honorable Supreme Court thus has the opportunity of bringing about ultimate justice in all three cases through the grant of a writ of certiorari in this one action, which is earnestly requested.

Respectfully submitted,

LeRoy J. Leishman,
Petitioner in propria persona.

John Flam,
Counsel for Petitioner.

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CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

October Term, 1951

No. 514.

LEROY J. LEISHMAN,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1951

No. 514.

LEROY J. LEISHMAN,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

Your petitioner hereby petitions this Honorable Supreme Court for a rehearing of his petition for a writ of certiorari. The present petition is filed under the provisions of Rule 33(2) of the Revised Rules of the Supreme Court of the United States, which reads in part:

> "* * * Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect * * * *or to other substantial grounds available to petitioner although not previously presented* * * *." (Emphasis added.)

Subsequent to the filing of the original petition, it has become increasingly clear that the many injustices and inconsistencies that have characterized the litigation of the

patent here at issue during the thirteen years in which it has been before the courts, have arisen primarily through a dangerous type of violation of Rule 52(a) F. R. C. P., upon which this Honorable Court has never passed.

It has also become apparent to petitioner since the filing of the original petition that this Honorable Court's decisions in *Cuno Engineering Corporation v. Automatic Devices Corporation,* 314 U. S. 86, 62 S. Ct. 37, and *Jungerson v. Ostly and Barton Company,* 355 U. S. 560, may be said to have modified the rule for determining invention enunciated in *Expanded Metal Co. v. Bradford,* 214 U. S. 366, and stressed by petitioner in his petition and reply brief, and that it should be called to the attention of this Honorable Court that petitioner's combination also fully meets the Bradford test *as thus modified.* The pertinence of the *Cuno Engineering* decision was not discussed in any manner in the petition and reply brief.

This petition for rehearing is accordingly based upon the following additional reasons not previously presented.

Additional Reasons Relied Upon for the Granting of the Writ.

1. The Court of Appeals for the Ninth Circuit has violated the spirit of Rule 52(a) and defeated its purpose in so far as the present case is concerned by making its own findings on technical matters and then basing its decision upon the assumption that these findings were accurate, whereas the rule provides that such finding shall be made by the trial court to permit witnesses for both parties to be examined and cross-examined and their credibility appraised by the trial judge while they testify. This type of violation results in cases being decided upon

grounds on which the litigants have not had their day in court.

2. If the appellate court, as its decision indicates, was interested in technical information that was not in the record, and if it found relevance in theories upon which the lower court had no opportunity to pass, the appellate court should have remanded the case to the lower court for the new trial which petitioner moved the lower court to grant under the provisions of Rule 59, F. R. C. P. [R. 59.] The denial of this motion by the trial court was one of the errors presented upon appeal. [R. 689, 691, 692.]

3. The appellate court has not decided this case in accordance with this Honorable Supreme Court's applicable decision in *Cuno Engineering Corporation v. Automatic Devices Corporation,* 314 U. S. 86, 62 S. Ct. 37.

The first of these three additional reasons why the writ should be granted, raises the following additional question of general importance:

Additional Question to Be Decided.

A. Inasmuch as Rule 52(a), F. R. C. P. states that the trial court "shall find the facts specially," and that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," is it proper for a Court of Appeals, as in the instant case, to supply the type of information ordinarily elicited from expert witnesses and then make its own findings in accordance therewith?

This very important question regarding the application of Rule 52(a) has been answered in the negative by the Courts of Appeals for the Sixth and Seventh Circuits,

as will hereinafter be shown, but the purpose and spirit of the rule have both been disregarded by the Courts of Appeals for the Ninth and Tenth Circuits. The question is one of such far-reaching importance, particularly to the correct determination of patent cases, that it should be answered by this Honorable Supreme Court.

Summary Statement of the Relevant Facts and the Pertinent Law Regarding the Appellate Court's Violations of Rule 52(a).

In *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.,* this Honorable Court said (336 U. S. 271, 274, 69 S. Ct. 535, 537):

> "Rule 52(a) of the Federal Rules of Civil Procedure provides in part: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' In no type of case is this last clause more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlighted by scientific demonstrations."

If it would have been wrong in the *Graver* case for this Honorable Court merely to set aside findings of fact based upon "the testimony of experts as to which a trial court may be enlighted by scientific demonstrations," then it is wrong for an appellate court itself to take the place of the experts and supply technical information under circumstances where there is no possibility of cross-examination or refutation or enlightenment by scientific demonstrations. This type of violation of the rule is even worse

than the kind which this Honorable Court has disapproved, yet the Court of Appeals for the Ninth Circuit decided the present case on just that basis.

Referring to a lack of technical evidence on a point of theory, the court said [R. 1196]:

> "While appellant contented himself with explaining the success of the [prior art] Schaefer tuner as resulting from these extra parts [which petitioner eliminated after others had failed], *the record is completely lacking in any explanation as to why the extra parts accomplished that result.*"[1] (Petitioner's emphasis and bracketed explanations.)

The appellate court itself then proceeded to supply the "lacking" technical information by explaining what it thought "the trial court could fairly conclude" [R. 1196] as to the manner in which balance was obtained and creeping eliminated in the Schaefer tuner; and the appellate court's ultimate finding on this point was that "basically the desired result is obtained because the tappet is so shaped and located that an imbalance is not possible." [R. 1197.]

The very theory here advanced and accepted by the appellate court was advanced by the witness opposing the patent in the case of *Leishman v. The Richards and Conover Company*,[2] but no finding supporting this theory was made by the trial judge because the witness on cross-

---

[1]If the theory behind the Zenith-Schaefer tuner was in any way an anticipation of petitioner's simplification, it was clearly respondent's burden to present the theory to the trial court and explain why it was not helpful to the General Motors, Zenith and Crosley engineers who undertook to simplify the complicated device.

[2]Civil Action No. 2155 in the United States District Court for the Western District of Oklahoma.

examination admitted it was wrong.[3] But in the present case, the erroneous theory is advanced *not* by a witness who can be examined in the trial court, but by the appellate court itself where the double checks contemplated by Rule 52(a) are not available.

In view of the Richards and Conover attempt to make it appear that the absence of creeping in the Schaefer tuner was due to the position of the tappet, petitioner anticipated a similar attempt at the trial of the present case, and he accordingly prepared a special model of the Schaefer tuner so that the court could be "enlightened by scientific demonstrations." In this model, the position of the tappet could be altered at will, and it operated just the same regardless of where it was placed. But respondent offered no testi-

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[3]The witness opposing the patent in that action was Dr. Spotts, Associate Professor of Machine Design at Northwestern University, and his admissions were made in response to the court's own questions, as follows:

"Q. (By the Court): Can you take that round spot, No. 55 [the pivot on which the tappet is mounted], in that yellow design, and put it any place other than where it is and the thing still work properly? A. *You can move it sidewise.*

"Q. Draw pictures of it there where it could be. Can you do that? Just take your pencil and draw a lot more of them, a lot of *other positions* where it could be. A. It could be located, if you have lateral support for members 26 and 27; *then you move this center sidewise without any effect in the operation.*

'Q. It could be anywhere on that line? A. *It could be sidewise* providing parts did not interfere. Providing that did nothing more than make points 57 and 58 retain contact with the horizontal surface.

"Q. It could be anywhere on that line you have drawn across there? A. I don't mean over here. (Indicating.)

"Q. I understand, but a reasonable distance so it would not conflict with any of the other parts. *Now if it is moved a quarter of an inch to the left of your line you say it would still work?* A. *Providing there is lateral guidance.*" [Page 192 of The Richards and Conover record filed in the present record by respondent.] (Petitioner's emphasis.)

mony of any kind in opposition to petitioner's testimony that creeping was prevented in the Schaefer tuner by the addition of the various extra parts, and petitioner was not even cross-examined on this point. The burden of proof to establish a different state of facts was upon respondent. Inasmuch as no attempt was made to do so, there was no occasion to introduce and demonstrate the model for the trial court. One does not rebut testimony that has not been offered.

Continuing to discuss the Schaefer tuner, the appellate court advanced still other technical information of a nature that should have come only from an expert in the trial court, where the witness could have been cross-examined and opposing testimony offered according to the provisions of Rule 52(a). The court said [R. 1197]:

> "* * * What appellant has done in effect (although there is no evidence of any conscious effort to that end), has been to tie together with cross-members the ends of the two lower arms or cross-bars of Schaefer, and to cut off the racks and pinions above the arms, and to insert rotatable shafts at the center of the new tie bars so that the arms or cross-bars on which the tappet operates will now rotate instead of move up and down. Here, as in the Schaefer device, creeping is avoided because of the attained equilibrium, the pressure on either side being continuously the same, and *this is obtained, of course, through the coaxiality resulting from the modifications just described.*" (Parenthetical explanation by the court; emphasis by petitioner.)

This additional error in the appellate court's unwarranted fact-finding, is demonstrated by the simple drawing appearing on the folding insert at the back of this petition. Superimposed upon the same drawing from the Schaefer patent which the court reproduced on page 1193 of its opinion, petitioner in green ink has drawn the tie bars connecting the cross-bars in the manner hypotheticated by the appellate court, and he has shown a rotatable shaft "at the center of the new tie bars" precisely as indicated by the court. But it will be noted that there is no "coaxiality resulting from the modifications just described." The shaft, shown at the center of the rocker, is *not* coaxial with the pivot of the tappet.

Petitioner's structure was thus not arrived at in any such manner as the appellate court has hypothecated, yet the court's erroneous assumptions have been made the basis of its reasoning that petitioner's combination involved only mechanical skill.[4]

Under the second reason relied upon for the allowance of the original petition, page 12 thereof, it was mentioned

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[4]Apparently Marschalk arrived at his structure in some such manner as the court has described. Marschalk's Fig. 14 has been reproduced directly under Schaefer's Fig. 4 on the folding insert. The altered Schaefer arrangement and Marschalk's figure bear a striking resemblance. Neither one is coaxial. The court itself tells us that Marschalk's tuner "proved unsatisfactory because of difficulty of avoiding 'creeping' . . ." [R. 1188], and the same would of course be true of a tuner arrived at by modifying the Schaefer tuner in the manner described by the court. None of the workers in the art had any idea that creeping could be prevented by shaping the tappet and rocker so that their axes would become coincident, or coaxial.

that the appellate court had said it could not reverse the lower court because the latter had had the exclusive opportunity of listening to the testimony of a certain witness whose testimony the appellate court stated was reasonably credible, whereas actually the testimony referred to by the appellate court had failed to stand up under cross-examination and the witness was accordingly not even mentioned in the lower court's opinion. It did not occur to petitioner when the original petition was filed, but this unauthorized appraisal of the credibility of the testimony of this witness by the appellate court was actually a serious violation of Rule 52(a). The task of determining the credibility of the witness and of making appropriate findings is delegated by Rule 52(a) to the trial court, which made no finding whatever regarding the said testimony—because it was controverted by the witness himself on cross-examination; but the appellate court, through this violation of Rule 52(a), came to a highly erroneous conclusion detrimental to petitioner because the appellate court did not have the opportunity afforded the trial court of hearing this witness testify.

What better demonstration could one want of the danger that lurks in fact-finding by appellate courts than the serious errors hereinbefore pointed out. In the instant case, gross injustice has resulted. The trial court made no findings whatever about these matters, but the appellate court's clearly erroneous findings have become the basis of the latter's opinion, which was in accordance with

its false premises. The Court of Appeals for the Sixth Circuit condemns this practice as follows:

> "* * * Without findings of fact from the trial court, the reviewing court would, in our judgment, violate both the letter and the spirit of Rule 52 in passing upon a controverted issue of fact * * * not determined in the trial court."
>
> *Hazeltine Corporation v. Crosley Corporation,* 130 F. 2d 344, 349.

The Court of Appeals for the Seventh Circuit, while not stating specifically that such a procedure is a violation of Rule 52(a), has nevertheless expressed its disapproval of formulating an opinion upon grounds which were not argued before the trial court. A suit had been filed in the District Court for the Northern District of Illinois involving a patent which the Court of Appeals for the Sixth Circuit had previously held invalid on a ground that had not been interposed in, nor considered by, the court below, nor had the ground been briefed or argued by either party. But notwithstanding the fact that the patent owner had thus never had its day in court on the ground upon which it had lost the Sixth Circuit case, Judge Sullivan in the Northern District of Illinois in the *Seventh* Circuit nevertheless granted a summary judgment against the patent owner in the new case because of the Sixth Circuit holding. When Judge Sullivan's decision was appealed, the Court of Appeals for the Seventh Circuit said:

> "As to Hazeltine v. General Motors, 170 F. 2d 6, it should be observed that the defense of 'statutory bar' was not interposed in the District Court. It

> was not briefed or argued by either party and not even considered in the lower court. *Consequently that decision is entitled to but little weight in the present proceedings.*" (Emphasis added.)
>
> *Hazeltine Research, Inc. v. General Electric Company,* 183 F. 2d 3, 6.

The said decision was "entitled to but little weight" because it was improperly arrived at. The impropriety there, as here, resulted from a violation of the letter and spirit of Rule 52(a).

Although this Honorable Court in the *Graver* case, ***supra,*** stressed the rule that findings made by the lower court should not be set aside unless clearly erroneous, it has never passed upon the propriety of an appellate court's making its own findings upon matters where the trial court has made no findings at all or "where the record is completely lacking"—to use the words adopted by the Court of Appeals of the Ninth Circuit to describe the void which it proceeded to fill with its own unchecked technical theories. In the present instance, this type of violation of Rule 52(a) has resulted in your petitioner losing the case on grounds upon which he has never been heard, because a litigant has no opportunity to introduce expert testimony or to give scientific demonstrations in opposition to theories advanced for the first time in the final decision of an appellate court. This type of violation is very serious, particularly in patent cases, and this Honorable Court should take the present opportunity to pass upon its propriety.

The Lower Courts Erred in Not Acting Upon Petitioner's Motion for a New Trial Under Rule 59, F. R. C. P.

In passing upon this question, this Honorable Supreme Court could well tell the appellate court that since the latter has attached controlling significance to matters that should be determined by the trial court, the case should be remanded to the lower court for such a new trial as petitioner moved the lower court to grant under the provisions of Rule 59, F. R. C. P. The lower court, as stated by the appellate court [R. 1192], "relied heavily" upon the decision of the Court of Appeals for the Tenth Circuit in *The Richards and Conover Company v. Leishman,* 172 F. 2d 365, an opinion based solely upon technical theories and a purported mathematical analysis formulated for the first time in that appellate court's opinion and admittedly having no basis in the record of that case. (See petitions filed in Supreme Court case No. 612, October Term, 1948.) The appellate court's opinion in that case was rendered *after* the present case had been tried, but *before* the lower court herein had rendered its opinion. Petitioner consequently had no opportunity to introduce expert testimony in the present record to show that the Court of Appeals for the Tenth Circuit was in error. When the lower court in the present case freely admitted [R. 42] that it was greatly influenced by the Tenth Circuit decision, your petitioner protested that he was thus losing *both* cases upon grounds advanced for the first time by the Court of Appeals for the Tenth Circuit and on which he had not been heard, and he consequently filed a motion with the said lower court to amend the findings or to grant a new trial [R. 59 *et seq.*] to permit the introduction of

testimony and other evidence in refutation of these new grounds.

In support of his motion for a new trial and in order to show the type of evidence that could be introduced, your petitioner filed affidavits by three outstanding authorities to the effect that the Tenth Circuit "analysis" was wrong. [R. 71 to 97.] These authorities were the heads of the departments of mechanical engineering at California Institute of Technology and the University of California, and the head of the corresponding department at the University of California at Los Angeles. Petitioner's motions were nevertheless "denied *in toto*." [R. 99.]

The refusal of the lower court to grant a new trial for the purposes here mentioned, was the basis of points 14, 15 and 16 in your petitioner's Concise Statement of Points upon which Defendant-Appellant will Rely as Required by Rule 75(d), F. R. C. P. * * *." [R. 689, 691, 692, to which this Honorable Court is respectfully referred.] These same points, bearing the same numbers, were repeated in the "Specification of Errors Relied Upon," which appeared in Defendant's-Appellant's Opening Brief herein.

The appellate court did not act upon the error of the trial court in refusing to grant this motion. The appellate court merely referred to the drawings made by the other appellate court, saying [R. 1200]: "We think it is not of particular importance here whether the court's diagram was, or was not, properly drawn." Instead of permitting your petitioner to show that the "analysis" made by the Court of Appeals for the Tenth Circuit was in error, the present appellate court advanced new and

substitute theories of its own which your petitioner likewise has had no opportunity to refute.

The failure of the Court of Appeals for the Ninth Circuit to act upon the trial court's error in denying the motion for a new trial, coupled with the appellate court's actions in making its own findings of fact and building its opinion around them, has thus resulted in a situation where we have opinions from *two* different courts of appeals each based upon technical theories that petitioner has had no opportunity to refute by expert testimony because the theories were advanced by the appellate courts themselves in violation of the provisions of Rule 52(a).

Why do these appellate courts set aside the findings of the lower courts and make totally new findings on points that should be supported by expert testimony before the trial judge? Perhaps the answer lies in the ironical fact that the better an inventor does his job, the less valuable his work appears. Most anyone seeing Schaefer's complete tuner would think that great genius was required for its conception. But if an inventor works hard and gets his device down to the acme of simplicity, it appears offhand that anyone could have done as well. As this Honorable Court said in *Diamond Rubber Company of New York v. Consolidated Rubber Tire Company,* 220 U. S. 428, 434: ". . . problems once solved present no difficulties. . . ." But the experts who have opposed the present patent know there were once difficulties in these tuners that seemed inherent in such structures unless various extra parts were introduced and that it took a flash of inspiration to find a simple solution. This is especially true of respondent's expert Schwarz, who himself worked on the problem. Schwarz knew that if he advanced theoretical alibis for his own dilemma that he would be tripped up on cross-

examination, as was Dr. Spotts at the Richards and Conover trial. There is consequently an absence of evidence against the patent; and the appellate courts, somehow, have felt obliged to advance their own theories as to how petitioner's combination could readily have been produced. The courts should have remembered that the General Motors, Crosley and Zenith engineers all tried in vain to produce a simple adjustable tappet tuner that would not creep, and that only petitioner succeeded.

This Case Has Not Been Decided in Accordance With the Supreme Court's Cuno Engineering Decision.

The foregoing brings us to a consideration of the fact that the criterion of invention given in *Expanded Metal Co. v. Bradford,* 214 U. S. 366, which this situation fully meets, has been in effect modified by this Honorable Court's later opinion in *Cuno Engineering Corporation v. Automatic Devices Corporation,* 314 U. S. 84, 62 S. Ct. 37, and that it has not been brought to this Honorable Court's attention that the present case has not been decided in accordance with the *Cuno* decision.

Since the *Cuno* opinion was rendered, a combination to be patentable must not only meet the test described as "safe" in the *Expanded Metal* case (see footnote 4, page 9, of the original petition herein), but the element that gives novelty to the combination must function in a new way or produce a result different from that produced by the said element in previous devices.

In the *Cuno* decision, this Court said (p. 89):

> "* * * the question is whether it was invention for one skilled in the art and familiar with Morris and Copeland, and with the extensive use of the automatic theremostatic control of an electric heating

circuit, to apply the Copeland automatic circuit to the Morris removable heating unit in substitution for a circuit manually controlled."

* * * * * * * *

"* * * As we have shown, both the thermostatically controlled heating unit and the lighter with a removable plug bearing the heating unit were disclosed by the prior art." [P. 89.]

* * * * * * * *

"* * * A new application of an old device may not be patented if the 'result claimed as new is the same in character as the original result' (Blake v. San Francisco, 113 U. S. 679, 683) even though the new result had not been contemplated. Pennsylvania R. R. Co. v. Locomotive Engine Safety Truck Co., 110 U. S. 490, 494, and cases cited. Certainly the use of a thermostat to break a circuit in a 'wireless' cigar lighter is analogous to or the same in character as the use of such a device in electric heaters, toasters, or irons, whatever may be the difference in detail of design." [Pp. 91-92.]

In the instant case, the unwanted rotation exhibited in Marschalk's tuner during the setting process was entirely eliminated by altering the shape of the tappet and rocker and changing the relationship of their axes. These parts then behaved in an entirely different way and accomplished a result which had only been achieved in the past by using many more parts. If the altered tappet and rocker were not new and different parts by virtue of this change, then it certainly can be said that the addition of the coaxial relationship between the axes of these members constituted

the addition of a new element. The question to be determined then becomes: Had a coaxial relationship ever been used before to stop unwanted rotation caused by the pressure of one freely pivoted member upon another? Respondent's own expert Schwarz, who was a man highly skilled in the art, admitted that he knew of no analogous use. He testified [R. 429-430]:

"Q. (By petitioner's attorney John Flam): Will you answer whether you have ever made parts coaxial in order to prevent movement of one of the parts? A. (By respondent's engineer Schwarz): *I cannot think at this moment of an instance.*

Q. Can you think of any example of one in which movement of both parts is prevented after they have become coaxial?

* * * * * * * *

The Witness: May I hear the question again?

(The question referred to was read by the reporter as follows: 'Can you think of any example of one in which movement of both parts is prevented after they have become coaxial?')

The Court: Movement of both parts?

Mr. Flam: Yes.

A. *I am sorry, I can't at this moment.*

Q. (By Mr. Flam): Then, so far as you know, this arrangement shown in the Leishman patent and as exemplified in these exhibits is unique, you haven't been able to find anything prior to 1937 like it, is that right? A. I haven't testified to the fact that I have seen this device presented to me as coaxiality. I don't believe that I could say that as of 1937 or 1938 or 1939 was the beginning of seeing this device as a unique one.

> Q. Prior to 1937 you saw no device, then, in which the principle or relationship of the parts utilized coaxiality to prevent any movement of one or both of the parts that become coaxial. A *I cannot think of an instance at this moment."* [R. 429-430; emphasis added.]

The unprecedented nature of petitioner's use of a coaxial relationship was also confirmed by Dr. Spotts, Associate Professor of Machine Design at Northwestern University, who was the expert witness opposing the patent in *The Richards and Conover* case, *supra.*[5] His testimony on other points was quoted by the Court of Appeals for the Ninth Circuit in its opinion here sought to be reviewed.

None of the workers in the art thought of using a coaxial relationship for the *prevention* of rotation, because it had been used for hundreds of years for the opposite purpose of *facilitating* rotation.

> "The importance of the mechanical relationship [coaxiality] is well known in the art and a feature that must be considered in all machine designing

---

[5]Dr. Spotts, on cross-examination, testified as follows:

"Q. (By Mr. Flam): Do you know of any device where a freely pivoted member presses on another freely pivoted member, both members being on separate pivots, in which movement between them is prevented by making them coaxial in a fully engaged position?"

Dr. Spotts at first did not grasp all of this question. Mr. Flam's clarification and Dr. Spott's answer were as follows:

"Q. Here we have two relatively movable bodies on separate axes and when they are brought together in full engagement there is some relative movement which is prevented by bringing the axis of one into the axis of the other. Do you know of *any* such device? *If you do I would like to hear about it?* A. *I don't believe I know of any."* [Pp. 195-196 of the *Richards and Conover* record, filed by respondent herein, emphasis added.]

> *when you desire parts to move together harmoniously* and free from friction . . . It is a mechanical principle that is hundreds of years old." (Petitioner's emphasis.)
>
> *Leishman v. Associated Wholesale Electric Company,* 36 Fed. Supp. 804, 808.

The Court of Appeals for the Tenth Circuit confirmed this statement as to the nature of the prior uses of coaxiality:

> "The principle of coaxial relationship and its importance *where it is desired that two parts of a machine operate together harmoniously,* has been within the knowledge, for many years, of ordinary mechanics skilled in the art." (Petitioner's emphasis.)
>
> *The Richards and Conover Company v. Leishman,* 172 F. 2d 365 at 369.

As Mr. Schwarz and Dr. Spotts testified, petitioner's use of a coaxial relationship for the opposite purpose of *preventing* rotation, was thus unprecedented. Unlike the situation that made the new combination unpatentable in the *Cuno* case, the use of the added element in petitioner's combination was not "analogous to or the same in character" as the prior uses. What better authority can we have for this than the statements of these two experts who were opposing the patent.

This test of invention, as well as the others applied by this Honorable Court in its decisions discussed in the original petition and supporting brief, were not followed by the Court of Appeals for the Ninth Circuit, and the appellate court has thus not decided this case in accordance with this Honorable Supreme Court's applicable and controlling decisions.

Conclusion.

Since the volunteer findings made by the Court of Appeals for the Ninth Circuit to support the lower court's opinion, are obviously in error, this Honorable Court should grant the petition so that the courts below may be reversed and a ruling made by this Honorable Court regarding the type of violation of Rule 52(a) that has produced the serious injustices demonstrated in this petition.

There is ample *undisputed* evidence in the testimony of respondent's own witnesses to support a proper opinion based upon the pertinent and controlling decisions of this Honorable Court, which said decisions are not concerned with such irrelevant matters as the mechanical theories behind admittedly unsatisfactory devices that skilled engineers tried unsuccessfully to simplify or to make operable before they were displaced by the patented combination in question.

Should this Court feel, however, that a determination of the issues requires correct findings upon the particular things on which the appellate court based its opinion, then there should be a new trial in accordance with petitioner's motion under Rule 59, F. R. C. P., which the lower court denied and the appellate court seemed to think unnecessary in view of its own findings on the points that would have been clarified by such new trial. The new trial was requested in order that petitioner might have an opportunity to introduce testimony and scientific demonstrations to show that the opinion of the Court of Appeals of the Tenth Circuit, which admittedly influenced the lower court herein, was wrong in its volunteered theoretical analysis of the difficulty that had to be overcome.

Inasmuch as this analysis dealt with the same difficulty which the Court of Appeals for the Ninth Circuit tried in the instant case to explain by its own volunteered findings, the originally requested new trial will automatically permit proper findings to be made upon the particular points on which the Court of Appeals for the Ninth Circuit based its erroneous opinion herein. If the case is remanded to the lower court for such new trial, it should therefore be limited to a consideration of these theoretical questions. It is urged, however, that such questions are irrelevant in view of the presence of abundant undisputed evidence of the kind required for a proper determination in accordance with the principles enunciated in this Honorable Court's pertinent and controlling opinions. Such a determination would be the safer course in the interest of justice in the present case, as most any trial judge at this stage in the litigation would be unconsciously inclined to decide the case in a manner that would not conflict with the previous expressions of its appellate court.

Respectfully submitted,

JOHN FLAM,
Counsel for Petitioner.

Certificate.

It is hereby certified that this petition is filed in good faith and not for delay and that it is confined to grounds not presented in the original petition.

JOHN FLAM,
Counsel for Petitioner.

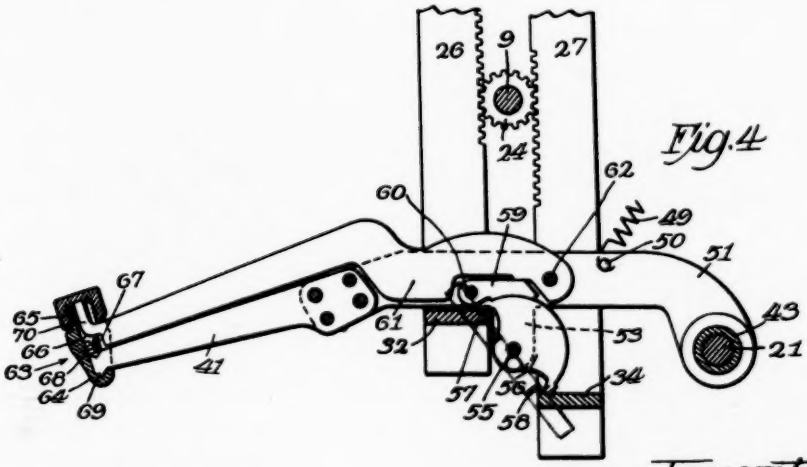

Fig. 4

Inventor:
Joseph M. Schaefer
By J. Clarke Hagey Atty.

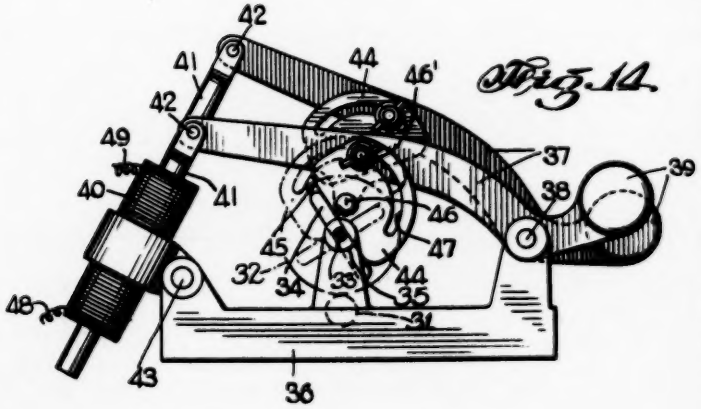

Fig. 14.

IN THE

Supreme Court of the United States

October Term, 1951
No. 514

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CHARLES ELMORE CROPL
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LEROY J. LEISHMAN,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

RENEWED PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI.

LEROY J. LEISHMAN,
744 North La Cienega Boulevard,
Los Angeles 46, California,
Petitioner, In Propria Persona.

JOHN FLAM,
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Respondent.

RENEWED PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI.

The Appellate Court Has Based Its Decision Upon Grounds and Purported Facts Adopted Without Due Process of Law.

Your petitioner is filing this renewed petition for a rehearing of the order denying certiorari, because he believes it has not been made clear to this Honorable Court that the decision sought to be reviewed, like all the previous appellate court decisions regarding this patent, was based upon purported facts and grounds advanced *subsequent* to the trial, *and that his constitutional rights have been violated by depriving him of his day in court* to present evidence and expert testimony to show that these purported facts are untrue and that there is no

substance to the grounds belatedly advanced against him. These purported facts were presented for the first time in the decision of the appellate court itself.

The appellate court explained that the trial court had "relied heavily" [R. 1192] upon the decision of the Court of Appeals for the Tenth Circuit in *The Richards and Conover Company v. Leishman*, 172 F. 2d 365. As a matter of fact, less than two pages of the trial court's ten-page opinion [bottom of R. 46 to middle of R. 48] was devoted to the evidence before it. The Court of Appeals accordingly undertook to bolster the lower court's opinion by presenting information of a technical nature on points where the appellate court said the record was lacking, and by usurping the duties delegated by Rule 52(a) to the trial judge.

The injustice of this situation is augmented by the fact that the decision of the Court of Appeals for the Tenth Circuit, which influenced the lower court herein, was itself based upon purported facts and theories appearing for the *first* time in *that* appellate court's opinion, which was rendered *after* the trial of the instant case. Petitioner consequently had no opportunity to introduce evidence or testimony either in the present case or in the Tenth Circuit case to show that the theories and purported facts presented by the Court of Appeals for the Tenth Circuit, and influencing the lower court herein, were in error. It was for the purpose of introducing such evidence into the present record that petitioner filed his Motion for a New Trial under Rule 59 [R. 59 *et seq.*], which was denied [R. 99]. Petitioner has thus never had his day in court to introduce evidence and testimony in refutation of the grounds which *either* of these appellate courts raised against him.

This situation could not have arisen had these appellate courts observed the provisions of Rule 52(a), F. R. C. P. This rule has the effect of implementing the 5th Amendment to the Constitution, which reads in part:

> "* * * No person shall . . . be deprived of life, liberty or property, *without due process of law,* nor shall private property be taken for public use without just compensation." (Emphasis added.)

Rule 52(a) contemplates that findings of fact will be based upon evidence presented before the district court where the grounds advanced against either party may be opposed by the testimony of witnesses whose credibility is to be determined by the trial judge.

According to Daniel Webster, the "due process of law" guaranteed by the Constitution is "The law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." American citizens, brought up on this tradition, have a feeling of security because of these constitutional guarantees, and they believe that the courts will immediately come to a citizen's rescue if these guarantees are violated. When circuit courts of appeals advance the purported facts and grounds upon which their decisions are based and thus violate the constitutional guarantees of litigants by depriving them of their day in court, there is no place to appeal for redress of these wrongs excepting to this Honorable Supreme Court which is the special guardian of the Constitution. Of what good are the high-sounding phrases of the 5th Amendment if they are disregarded in actual practice by the courts themselves?

It is not necessary to go further than the opinions to verify that he courts of appeals, in the litigation with respect to this patent, have advanced the grounds and supplied the purported facts upon which their opinions were primarily based.

Instance No. 1.

In this regard, the petition for rehearing (p. 5) quoted the admission of the Court of Appeals for the Ninth Circuit as to a lack of evidence on a technical point, as follows:

> "'While appellant contented himself with explaining the success of the [prior art] Schaefer tuner as resulting from these extra parts [which petitioner eliminated after others had failed], *the record is completely lacking in any explanation as to why the extra parts accomplished that result.*' (Petitioner's emphasis and bracketed explanations.)"

In view of this admission regarding a lack of evidence as to how the desired result was attained in the Schaefer tuner, it is unnecessary to prove that the court was itself supplying the supposed factual data when it stated that "basically the desired result [in the Schaefer tuner] is obtained because the tappet is so shaped and located that an imbalance is not possible." [R. 1197.] The petition for rehearing (pp. 5 to 7 thereof) showed that this supposed statement of fact is in error; but, true or false, such purported fact should not have been used by the appellate court as a premise in its reasoning—*because your petitioner had no opportunity to present expert testimony or other evidence in refutation.*

Instance No. 2.

It is also unnecessary to prove that the court's explanation as to the manner in which petitioner arrived at his structure, is likewise a theory originating with the court itself and having no basis in the record, for the court specifically states [R. 1197] "there is no evidence of any conscious effort to that end . . ." The petition for rehearing showed that the court's volunteered theory on this point was in error;[1] but erroneous or true, the appellate court should not have hinged its decision on the assumption that its theory was correct—because the Constitution guarantees every man the right to present a defense against the grounds upon which he is deprived of his property.

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[1]The court of appeals contended that petitioner had in effect tied Schaefer's lower cross bars together with cross members or tie bars and inserted rotatable shafts "at the center of the new tie bars so that the arms or cross-bars on which the tappet operates will now rotate instead of move up and down," and that equilibrium was obtained "through the coaxiality resulting from the modifications just described." On the folding insert at the back of the Petition for Rehearing, such an arrangement was drawn on a reproduction of Schaefer's Fig. 4. Reference to this figure shows that when the tips 57 and 58 of Schaefer's tappet are in contact with cross bars thus tied together, the axis of Schaefer's tappet *lies in the same plane as the top surface* of the tie bars, and such axis could therefore not be coaxial with shafts inserted *"at the center* of the new tie bars," as described by the court. An axis lying on the top surface of the tie bars would clearly not be coaxial with an axis *at the center* of the tie bars. No testimony to the effect that such an arrangement would be coaxial was introduced at the trial, nor was such a theory presented by respondent: the supposed statements of fact about this were based upon the appellate court's own incorrect observations which petitioner had no opportunity to expose as erroneous. Prior to petitioner's invention, no one suspected that "creeping" could be prevented by changing the relative position of the axes. The skilled workers in the art all tried to solve the problem by introducing extra parts, as shown by the patents of the Crosley, Zenith and General Motors corporations and by the actual tuners used by Zenith and General Motors before they adopted petitioner's teachings.

Instance No. 3.

A third ground advanced by the appellate court for holding against the patent, involves what might be called a compound violation of petitioner's constitutional rights, for this third ground is supported solely by a previous decision of the Court of Appeals for the Ninth Circuit which was itself based upon grounds advanced only by the appellate court and upon which petitioner was given no opportunity to be heard.

In this connection, the court says [R. 1209-1210]:

> "The most outstanding respect in which appellant's claimed invention falls short of meeting these tests[2] [of invention given in the appellate court's opinion in Pointer v. Six Wheel Corporation, 177 F. 2d 153] is in respect to the fourth item, for the evidence fails to show that it superseded any prior devices or met with any commercial success. No *lever* operated tuner with appellant's tappet rocker system, either with or without the additional provision for television tuning, was ever built commercially. The only tuners manufactured under license from appellant were *leverless push-button tuners of the type held not to be covered by the patent in suit in Leishman v. Commercial Electric Co., supra.*" (Petitioner's emphasis and bracketed explanation.)

None of the claims at issue requires that petitioner's combination be operated by a lever; in fact, the invention has nothing whatever to do with the operating means.

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[2]The inference here is that the court considers that petitioner's combination fails to meet the tests in some other way, but the opinion mentions none. Footnote 16 on page 44 of the Brief in Support of Petition for Writ of Certiorari showed that petitioner's combination fully meets the said tests in all respects.

Yet in support of its contention that "the evidence fails to show that it superseded any prior devices or met with any commercial success," the appellate court says that "No *lever* operated tuner with appellant's tappet rocker system . . . was ever built commercially." The court thus refuses to consider the millions of tuners "with appellant's tappet rocker system" that were *plunger* operated. The court justifies its failure to consider these by referring to them as "*leverless* push-button tuners of the type held not to be covered by the patent in suit in *Leishman v. Commercial Electric Co., supra.*" Since there was no litigant by the latter name, the court obviously means *Leishman v. Associated Wholesale Electric Co.*, 137 F. 2d 722. The grounds relied upon by the appellate court in that case for its holding that "leverless" tuners were not covered by the patent, were novel grounds originating with the appellate court itself, and your petitioner and the lower court consequently had no opportunity to consider them.[3] When the appellate

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[3]In the *Associated* case, the lower court held the claims invalid for want of invention and no findings were made with respect to infringement, but the appellate court wiped out the holding of invalidity and acted only upon infringement—basing its decision upon novel grounds of its own. The court held that the reissue claims at issue were not for the same invention as the original claims unless they included levers. Original claim 5 included no lever, but the court specifically mentioned that it was not considering this claim because it had later been disclaimed. It was not disclaimed, however, until several months after the reissue patent, which included claim 5, was granted with six narrower claims that likewise included no lever. Claim 5 was thus a part of the original patent when the reissue was granted with the additional narrower claims. To say that the *subsequent* disclaimer of claim 5 made it improper to consider this original claim when determining whether the reissue was for the same invention as the original, is like holding that children born in wedlock to parents who are *later* divorced, become illegitimate on the grounds that the subsequent divorce makes it improper to consider that the parents had ever been married.

court contends in the *instant* case that petitioner's combination does not meet the fourth item in its tests for invention because the tuners that superseded the prior devices were "leverless" tuners held not to be covered by the patent in the *Associated* case, the court thus bases its action upon its previous decision which was arrived at through a violation of petitioner's constitutional right to be heard on the grounds raised against him.

The appellate court's decision in the instant case is thus built almost entirely upon improper findings made by the said court in violation of Rule 52(a) and upon grounds advanced for the first time in final decisions of the appellate court in violation of petitioner's constitutional right to present evidence and testimony in his own behalf.

As mentioned earlier in this paper, there would have been no occasion for the appellate court to manufacture theories and advance new purported facts in support of a decision against the patent, had the trial court based its own decision upon the testimony and other evidence herein instead of upon the decision in *The Richards and Conover Company v. Leishman, supra,* on which the present appellate court states that the trial court in the instant case "relied heavily" [R. 1192].

Instance No. 4.

When it is realized that the said *Richards and Conover* decision, which influenced the lower court herein, was based *entirely* upon grounds advanced *for the first and only time* by the Court of Appeals for the Tenth Circuit after *all* trials in connection with this patent had been

held,[4] it becomes clear that all the appellate court decisions with respect to this patent, as well as the decision of the lower court in the instant case, have been based primarily upon grounds on which your petitioner has never had his day in court.[5] The trials have meant little,

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[4]In the Petition for Writ of Certiorari in the *Richards and Conover* case, No. 612, October Term, 1948, reason 3a relied upon for the allowance of the writ was as follows:

> "a. The appellate court ignored the admissions of the expert opposing the patent, brushed aside the arguments that respondent advanced against validity, and proceeded *sui sponte* and incorrectly to analyze the problem solved by petitioner's combination."

The Petition for Rehearing in the *Richards and Conover* case, pages 17 to 26, showed very graphically that the grounds advanced by the appellate court, and which petitioner consequently had no opportunity to oppose by expert testimony and other evidence, were grossly in error. In the belief that this Honorable Supreme Court may not have copies available of the Petition for Rehearing in the *Richards and Conover* case, ten copies are being furnished herewith, marked Exhibit A.

[5]After this Honorable Supreme Court reversed the Court of Appeals for the Ninth Circuit in its dismissal of the appeal in *Leishman v. Associated Wholesale Electric Co.* (137 F. 2d 722; also 318 U. S. 203), the said court of appeals brushed aside the findings of the lower court with respect to validity and decided the case upon novel grounds respecting the issue of infringement—an issue on which the lower court had made no findings at all.

In *The Richards and Conover Company v. Leishman, supra,* the lower court had held the claims clearly valid and clearly infringed, but the Court of Appeals for the Tenth Circuit ignored the lower court's findings and all the evidence in the case and decided the issue of intention upon its own purported mathematical analysis of the problems involved.

In *Leishman v. Radio Condenser Company and General Instrument Corporation,* 167 F. 2d 890, the action originated with a complaint filed by these manufacturers under the Declaratory

for the so-called facts on which the decisions have hinged have been produced by the appellate courts themselves after petitioner's opportunity to defend his rights had passed.

Trials have been conducted in only three of the four cases that have been decided respecting this patent. Everything that the district courts said regarding the issues tried in the first two of these three cases, was wiped out by the appellate courts. Less than two pages of the ten-page opinion of the judge who conducted the present and last trial was devoted to the evidence before him. His findings were so erroneous that practically the entire opinion of the appellate court herein has been devoted to an effort to rationalize what was said in those two pages, and this rationalization has been supported almost entirely by purported facts and theories presented by the appellate court itself in violation of petitioner's constitutional right to be heard on the grounds raised against him. This history shows on its face that something is wrong, and that the supervisory attention of this Honorable Supreme Court is required.

Judgment Act, and it was decided without trial by Summary Judgment based upon the decision of the Court of Appeals for the Ninth Circuit in the earlier *Associated* case, which had been decided upon grounds on which petitioner had never been heard.

In the instant case, the action originated with a complaint filed under the Declaratory Judgment Act by General Motors Corporation, and the appellate court's decision has been based primarily upon erroneous purported facts asserted for the first time by the appellate court and upon a reassertion of the grounds relied upon in violation of petitioner's constitutional rights in the *Associated* case.

Decisions Cannot Be Based Upon Purported Facts Produced in Violation of a Litigant's Constitutional Rights.

This Honorable Supreme Court has many times held that decisions cannot be based upon evidence produced in violation of the constitutional rights of litigants. In *Weeks v. United States,* 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, 655, 656, 658, this Honorable Court said:

> "In Bram v. United States, 168 U. S. 532, L. Ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547, this court, in speaking by the present Chief Justice of Boyd's case, dealing with the 4th and 5th Amendments, said (544):
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> " 'It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change." (58 L. Ed. 652, 655.)

At page 656 of its decision in *Weeks v. United States,* 58 L. Ed. 652, this Honorable Court said:

> "* * * If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

And at page 658, the Court said:

> "* * * In holding them [the letters and documents] and permitting their use upon the trial, we thing prejudicial error was committed." (Petitioner's bracketed explanation.)

If it is improper to use *actual* physical evidence because it is obtained in violation of a litigant's constitutional rights, even though he may have an opportunity to rebut such evidence, it is far worse to permit the use of purported facts that are court-conceived and which the litigant is denied his constitutional right to controvert.

In *Wolf v. People of the State of Colorado,* 338 U. S. 25, 69 S. Ct. 1159 at 1361, this Honorable Court said:

> "Due process of law . . . conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society."

Your petitioner respectfully urges that these rights that are basic to our free society should be enforced by the courts in behalf of inventors as well as others. In *Terminiello v. City of Chicago,* 69 S. Ct. 894, 337 U. S. 1, and in *Dennis et al. v. United States,* 71 S. Ct. 857, 341 U. S. 494, this Honorable Court has been very careful to consider whether the constitutional rights of communists and fascists have been protected, and your petitioner prays that his rights be given equal consideration.

In accordance with the doctrine expressed in *Weeks v. United States, supra,* none of the purported facts that have been offered in violation of petitioner's constitu-

tional rights, can properly be considered in this case. This Honorable Court should therefore grant the petition for a writ of certiorari to the end that a new and proper decision may be rendered in accordance with the evidence presented before the trial court.

Respectfully submitted,

LEROY J. LEISHMAN,
Petitioner, In Propria Persona.

JOHN FLAM,
Counsel.

Certificate.

It is hereby certified that this petition is filed in good faith and not for delay and that it is confined to grounds not presented in the original petition nor in the first petition for rehearing.

LEROY J. LEISHMAN,
In Propria Persona.